

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 - - - - -

4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown &

14 Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF PHILIP MORRIS INCORPORATED

23 (DESIGNEES CLARE PURCELL, KENNETH S. HOUGHTON,

24 ELLEN MERLO AND ROBERT L. MIKULAY)

25 VOLUME I, PAGES 1 - 292

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1 (The following is the deposition of PHILIP
2 MORRIS INCORPORATED (DESIGNEES CLARE PURCELL,
3 KENNETH S. HOUGHTON, ELLEN MERLO AND ROBERT L.
4 MIKULAY), taken pursuant to Notice of Taking
5 Deposition and Rule 30.02(f), by videotape, at the
6 offices of Dorsey & Whitney, Attorneys at Law, 250
7 Park Avenue, 16th Floor, New York, New York, on
8 September 23, 1997, commencing at approximately 9:13
9 o'clock a.m.)

10

11

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1 ALSO PRESENT:

2 David Grandes, Paralegal

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1 I N D E X

2	EXHIBITS	DESCRIPTION	PAGE MARKED
3	PM 1300	Plaintiffs' Document Requests	
4		Relating to Formulae, 5 pages	19
5	1303	January 23, 1990 interoffice	
6		correspondence, Keritsis to	
7		Callahan, Bates 2023957309-23	112
8	1304	July 29th, 1987 New Tar	
9		Quality, Pyrolysates to	
10		Distillates, Bates	
11		2023186690-A	128
12	1305	Searchmanager 370 - Documents	
13		Printed from Database, by	
14		Jeanneret, Bates 2028635742	133
15	1306	March 21, 1963 letter, Kelly	
16		to Boling, Bates 1005040524	195
17	1307	December 16, 1968	
18		correspondence, Johnston to	
19		Seligman, Bates 2023066583-92	201
20	1308	March 20, 1984 The Cigarette	
21		Consumer, Bates	
22		2500002189-207	255
23	1309	Smoker Dynamics, Bates	
24		2023741642-78	268
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1 P R O C E E D I N G S

2 (Witness sworn.)

3 CLARE PURCELL

4 called as a witness, being first duly

5 sworn, was examined and testified

6 as follows:

7 ADVERSE EXAMINATION

8 BY MR. GORDON:

9 Q. Good morning. Could you state your full name
10 for the record, please.

11 A. Clare Ann Catherine Corcoran Purcell.

12 Q. Ms. Purcell, this is the second time you're
13 being deposed in this litigation, so we're going to
14 assume that your -- is your position the same as it
15 was when we took your deposition a few months ago?

16 A. What does that mean? I'm sorry. My position
17 is --

18 Q. At Philip Morris.

19 A. Yes.

20 Q. Okay. Then I won't go into your background
21 right now.

22 It's my understanding you are appearing here
23 today to speak on behalf of Philip Morris with
24 respect to its collection and production of documents
25 relating to its cigarette formulas. Is that your

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1 understanding?

2 MR. NUNLEY: Objection.

3 A. Category II documents.

4 Q. Okay. So the jury understands what Category II
5 documents are, could you explain that phrase.

6 A. There was an order that defined Category II as
7 documents that would be highly sensitive and the
8 disclosure of those documents could cause irreparable
9 competitive harm, and there was another section of
10 that that then to make them Category II said that
11 they had to have information on ingredients or
12 formula, I believe.

13 Q. Ingredients or formula for --

14 A. Cigarettes.

15 Q. -- Philip Morris cigarettes?

16 A. That's right.

17 Q. Okay. And when did you first become in --
18 strike that.

19 Were you personally involved in any aspect of
20 collecting or producing the Category II formula or
21 ingredient documents?

22 A. I don't personally maintain any of those files.
23 Is that what you mean?

24 Q. No. I -- my question goes to the process that
25 Philip Morris went through to -- well let me back

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1 up. Strike all that.

2 Philip Morris has in fact produced documents
3 designated as Category II formula or ingredient
4 documents; is that correct?

5 A. That's correct.

6 Q. Were you personally involved in any aspect of
7 collecting or producing any of these documents?

8 MR. NUNLEY: Objection as to form. You may
9 answer.

10 A. I became involved for the purposes of this
11 deposition or my earlier deposition in the process
12 generally by interviewing people who were directly
13 involved or who had those documents.

14 Q. Do I take that to mean that you yourself were
15 not personally involved in gathering or producing the
16 Category II documents?

17 A. That's correct. I did not personally maintain
18 them. I did not personally collect them or produce
19 them.

20 Q. When did you first become involved in
21 interviewing people who were personally involved?

22 MR. NUNLEY: Objection as to form.
23 Personally involved in the Category II collection and
24 production?

25 MR. GORDON: Correct.

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1 A. Well you'll remember in that two days we spent
2 together -- that seems a little bit longer than two
3 days -- last spring we talked about this process. I
4 think some of the people who I spoke to then were
5 involved in Category II documents, so I may have
6 talked to them earlier, but more recently I went back
7 and interviewed about 12 or 15 people in the company
8 who I knew would have had records that would fall
9 into the Category II group.

10 Q. Okay. You understand that Category II documents
11 have been produced by Philip Morris subsequent to
12 when we last met in a deposition; correct?

13 A. Yes, all the way up to yesterday.

14 Q. Right. And in fact, more are being produced
15 tomorrow; correct?

16 A. I believe so, this week.

17 Q. Are you aware of the documents that are being
18 produced tomorrow?

19 A. I don't think I can name them. I know that
20 we're still -- we still have efforts ongoing to meet
21 the September 4th order.

22 Q. Who's responsible for those efforts?

23 MR. NUNLEY: May I just say is it tomorrow
24 or Thursday that the -- you keep referring to
25 production of documents tomorrow and I --

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1 MR. GORDON: Well there's -- correct me if
2 I'm wrong, but my understanding is there were certain
3 documents required to be produced within 20 days of
4 the September 24th order.

5 MR. NUNLEY: You may be right. I may be
6 off by a day. Sorry. Although I note that there is
7 an extension in the case. I'd ask to -- I believe
8 the extension -- I mean, I don't want to debate it
9 with you here. I don't mean to interrupt you, but I
10 think there's a -- the order entered by the court
11 went to paragraph 1 of his prior order, and I think
12 that was both 1A and 1B, but obviously the order
13 speaks for itself.

14 MR. GORDON: We -- we can speak off the
15 record --

16 MR. NUNLEY: Certainly.

17 MR. GORDON: -- because my understanding is
18 that it specifically exclude -- the relief sought
19 specifically excluded the -- the computer model
20 information, but we'll address that after
21 Ms. Purcell.

22 BY MR. GORDON:

23 Q. Who's involved in the ongoing efforts that you
24 just spoke of?

25 MR. NUNLEY: Objection as to form.

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1 A. We have -- since the order came out, we have had
2 counsel, outside counsel, in-house counsel, and
3 employees involved in that review and production.

4 Q. Who are the employees involved?

5 A. I know that there is still an ongoing issue with
6 a computer model, so the employees who work closely
7 with that in R&D may be involved. There may be
8 additional work that needs to be done to correct some
9 typographical or printing problems on what we
10 produced to you yesterday, so there would be other
11 individuals in R&D who may be involved in that.

12 Q. Who are the Philip Morris employees involved in
13 searching for and producing computer models?

14 A. I know the person who has been responsible for
15 most of the time for that computer model, and that's
16 Bill Dwyer in R&D.

17 Q. What is Mr. Dwyer's title?

18 A. I'm not sure. It may be senior research
19 scientist.

20 Q. Is he one of the people you've interviewed?

21 A. I have spoken with him, yes.

22 Q. When was the most recent time you spoke with
23 him?

24 A. Oh, gee, I think sometime in the past two or --
25 two weeks.

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1 Q. Did you speak with him specifically about what
2 he is doing to respond to the portion of the court
3 order relating to computer models?

4 A. I spoke with him just to get a better
5 understanding of what that computer model was. I
6 don't normally work with it or nor did I have any
7 knowledge of it before that.

8 Q. Well what did he tell --

9 MR. NUNLEY: Mr. Gordon, excuse me, just an
10 objection to this line. I don't know frankly at this
11 point whether this model that you're referring to is
12 a Category II document or a Category I document.
13 Obviously you -- you can't know either, but to the
14 extent it's a Category -- it is not a Category II
15 document, it would fall outside the scope of this
16 notice. I'm certainly not going to stop Ms. -- your
17 questioning or Ms. Purcell testifying about it, but I
18 just put you on notice if it turns out that it's not
19 a Category II document, I take the position that --
20 that Ms. Purcell cannot testify on behalf of the
21 company as to its -- questioning relating to that
22 model.

23 Q. What did Mr. Dwyer tell you to give you an
24 understanding of what the computer model was?

25 A. He described it to me more or less as a

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1 beginner's tool where you could work with design
2 parameters and get information or project information
3 on a prototype performance parameter.

4 Q. Where is it your understanding that the computer
5 model is kept?

6 A. I think it's kept in R&D on the main system.

7 Q. In Richmond?

8 A. Yes.

9 Q. In your inquiries did you make any efforts to
10 determine whether there were any computer models that
11 were located in Neuchatel, Switzerland?

12 A. No. I asked him specifically if he knew if that
13 model was in use elsewhere, and he said he didn't
14 know if it had ever been used anywhere else.

15 Q. You're talking about -- strike that. What --
16 What do you mean by "that model"?

17 A. Well I don't know -- I don't mean to imply that
18 there are any others. I don't know if there are any
19 others, but this was the first I'd heard of a design
20 model, so I asked him if this was something that he
21 worked with, did other people have it. I asked more
22 along the lines of security questions, you know, who
23 might have access to it, and he didn't know of anyone
24 outside the people who use it.

25 Q. In answer to my question about a computer model

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1 in Neuchatel, you said that he didn't know if that --
2 that model was in use elsewhere. Did you mean to
3 refer to a model -- a computer model in Neuchatel,
4 Switzerland?

5 A. No. I don't know of any model in Neuchatel,
6 Switzerland.

7 Q. Okay. So whether there is one or not, you have
8 no idea?

9 A. That's correct.

10 Q. And your inquiries today in order to speak on
11 behalf of Philip Morris for collection of Category II
12 documents, you did not determine whether or not there
13 are any predictive computer models in Neuchatel,
14 Switzerland?

15 A. I did not ask that question, that's right.

16 Q. And you don't know?

17 A. I don't know.

18 Q. Okay. Who were the -- the 12 to 15 people you
19 interviewed?

20 A. I'll try to remember them all. I know I spoke
21 with Marian Debardeleben in R&D. I spoke with Cliff
22 Lilly, Jerry Whidby, David Williams, Elmore Cooke,
23 Mary Beth Lambert, Greg Nixon, Brad Scott, Jim
24 Myracle, Lance Pullano and Les Thomas.

25 Those are all the ones I recall right now. How

1 many's that?

2 Q. 11. That's about right.

3 A. I'm sorry, Mary Susan Schreck.

4 MR. NUNLEY: Pardon me, Ms. Purcell, let me
5 hand something to the court reporter.

6 (Discussion off the stenographic record.)

7 Q. Was there one person who was in charge of the
8 Category II collection?

9 MR. NUNLEY: Objection as to form.

10 A. There was not -- I wouldn't describe it as one
11 person in charge. The collection did ask certain
12 individuals to take a more significant role.

13 Q. Who were the people that had the most
14 significant role in the Category II collection?

15 A. When I say "more significant," it was more a
16 coordinating role, and that would be Cliff Lilly and
17 Jerry Whidby in R&D and Jim Myracle and Brad Scott in
18 manufacturing, I believe.

19 Q. Who had overall responsibility for selecting
20 which people to participate in the collection
21 process?

22 MR. NUNLEY: Objection as to form.

23 A. I'm not sure how to answer that. Would it help
24 if I described sort of the chronological process of
25 how we -- how we focused on Cat II, and --

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1 Q. Sure.

2 A. -- would that help?

3 You will remember that we had the collection
4 ongoing in the fall of '95. That winter, early '96
5 and late in the fall of '95, there were individuals
6 who had raised some issues with in-house counsel and
7 outside counsel about the sensitivity of some of the
8 documents that may fall within the broad scope
9 statement that we were using while we were conducting
10 the interviews. There was a meeting held early in
11 '96 with in-house and outside counsel and senior
12 folks in Richmond both on the R&D side and the
13 manufacturing side, and they sat down trying to
14 determine how they would break out those sensitive or
15 trade-secret or what we refer to now as Category I
16 and Category II documents and how we could collect
17 and produce them but still protect them.

18 By March of that year, in-house counsel issued a
19 memo to those same people that described or clarified
20 a little bit more what would be considered those
21 documents, how we would determine what those
22 documents were. That was then shared with
23 individuals who we believed would have those
24 documents, and when individuals were foldering -- you
25 remember the process; we put folders around their

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1 files or counsel came in and reviewed their office
2 and put folders around their files. If they came
3 across something that they thought was what we refer
4 to as ultra trade secret, could be Category I, could
5 be Category II, they would put it in a different
6 colored folder, and those files didn't get picked up
7 and taken away along with the rest of the
8 collection. They waited for Cliff and Jerry or Brad
9 and Jim to come by and rereview everything in those
10 folders because they felt that that would give a
11 little bit more consistency to the determinations of
12 what fell within those categories, and they were also
13 able to cut back on some overdesignation that
14 employees tended to do.

15 At that point they were then processed on site
16 if they had decided when -- "they," I mean Cliff and
17 Jerry and Brad and Jim. If they decided that these
18 actually were not in that category, they would put
19 them back in the other colored folder and send them
20 off with the rest of the collection; otherwise, they
21 kept them on site and did the copying on site.

22 Did that answer your question?

23 Q. And this is a process that was ongoing during
24 1996?

25 A. Yes.

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1 Q. At the same time that other documents were being
2 collected as well?

3 A. Yes.

4 Q. Okay.

5 MR. GORDON: Can I have the court reporter
6 mark this, please.

7 (Plaintiffs' Exhibit 1300 was marked
8 for identification.)

9 THE WITNESS: Thank you.

10 BY MR. GORDON:

11 Q. Ms. Purcell, I'm showing you what's been marked
12 as Plaintiffs' Exhibit 1300, a five-page document
13 bearing the caption of this case and entitled
14 "PLAINTIFFS' DOCUMENT REQUESTS RELATING TO FORMULAE"
15 dated December 16, 1996.

16 Have you seen this document before?

17 A. Yes, I have.

18 Q. When was the first time you saw it?

19 A. I don't recall when the first time was that I
20 saw it. I've looked at it a couple of times recently
21 preparing for today.

22 Q. Okay. And you see that the requests in this
23 document seek the specifications, ingredients and
24 full formula for each brand of cigarettes that Philip
25 Morris marketed in Minnesota from 1954 to the

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1 present; correct?

2 A. Documents sufficient to disclose those, yes.

3 Q. Right. And this was a request that Philip

4 Morris received at the end of 1996; correct?

5 A. That's correct.

6 Q. So the process that you've just described was

7 not in response to the requests that are set forth in

8 Exhibit 1300; correct?

9 MR. NUNLEY: Objection as to form.

10 A. Can you try that one again?

11 Q. The doc --

12 The process that you described a little bit

13 earlier was a process that was ongoing in 1996 while

14 other document requests were being responded to by

15 Philip Morris; correct?

16 A. That's correct.

17 Q. And this document request -- by "this," I mean

18 Exhibit 1300 -- didn't come to Philip Morris until

19 December of 1996; correct?

20 A. That's correct.

21 Q. So the process that had been ongoing up to that

22 point was not in response to the requests in

23 Exhibit 1300; correct?

24 A. That's right. It was not a new process

25 established to respond to this.

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1 Q. Okay. What --

2 Well, you hadn't gotten this yet?

3 A. That's right.

4 Q. Okay. What I want to know is what Philip Morris

5 did after it got the requests set forth in

6 Exhibit 1300; in other words, after mid-December

7 1996, in order to -- to collect and produce documents

8 responsive to these specific requests.

9 A. Okay. I think in March you and I touched on

10 this a little bit because I remember going over this

11 at the break with David Williams. What was done

12 initially and when these were received is there was a

13 meeting held in-house of some of the people who would

14 be key people who might have that information. That

15 meeting included in-house counsel, Jim Schardt, as

16 well as Dick Cox from research, David Williams. I

17 think Mary Susan Schreck was there. I think Cliff

18 Lilly was there, and there may have been others.

19 Q. Who is Jim Schardt?

20 A. Jim Schardt is an in-house Philip Morris

21 attorney.

22 Q. How about David Williams?

23 A. David Williams works in a division called

24 product integrity in R&D.

25 Q. Is there anyone else that you can think of who

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1 was at this initial meeting following the document
2 requests in --

3 A. I think Elmore Cooke may have been there or Mary
4 Beth Lambert, but someone from that group was there.

5 Q. What group is that?

6 A. Flavor technology.

7 Q. You were not there?

8 A. I was not there.

9 Q. What did you do to find out what happened at
10 that initial meeting?

11 A. I spoke with Cliff Lilly a while ago to find out
12 what happened at that meeting and again with David
13 Williams more recently. I was told -- and I think I
14 went through this a little bit with you in March --
15 that they held that initial meeting in an attempt to
16 focus specifically on these two requests and
17 determine whether or not -- what it would take to
18 give you what you were asking for in these requests,
19 what documents, what categories of documents, what
20 types of documents you would need to have to meet
21 this request.

22 They then went back to their respective areas.
23 They checked with the collection that had gone on.
24 They checked with others in their departments, and
25 then they got back together again to make sure that

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1 they in fact had a good list of all the types of
2 documents that you would need to get this
3 information, and I think those were outlined in a
4 brief that we filed in March.

5 Q. Where were the documents collected from?

6 A. Generally speaking, documents would be collected
7 from leaf and from R&D. Within R&D, it would be the
8 product integrity area and the flavor technology
9 area.

10 Q. How about manufacturing?

11 A. Leaf is in manufacturing.

12 Q. Where is leaf located?

13 A. They're located in the operations center in
14 Richmond.

15 Q. How about R&D? Where is that located?

16 A. R&D is -- our R&D operation is in Richmond as
17 well.

18 Q. So all of the documents that were collected for
19 the Category II production came from Richmond; is
20 that correct?

21 MR. NUNLEY: Mr. Gordon, just a point of
22 clarification: You refer to Cat II. Just so we're
23 clear, when you say all documents for the Cat II
24 production, you know, there are non-documents of this
25 type that are Cat II. There's some advertising

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1 documents. There's some marketing documents.

2 I mean, you're talking about Cat II documents
3 responsive to this request?

4 MR. GORDON: Right.

5 MR. NUNLEY: Okay.

6 MR. GORDON: I'm talking about the -- the
7 Exhibit 1300, specifications, ingredients and the
8 full formula documents.

9 MR. NUNLEY: Documents sufficient to
10 disclose those.

11 MR. GORDON: Right.

12 BY MR. GORDON:

13 Q. Those came from -- all came -- would have all --
14 have all come from Richmond?

15 A. I believe so, yes.

16 Q. No place else was searched for responsive
17 documents to these requests?

18 MR. NUNLEY: Objection as to form.

19 A. The entire company was searched under the broad
20 scope. To specifically see if we had documents
21 sufficient to show both of these areas, one and two,
22 that group got together and that's where the bulk of
23 the documents would be, because it's just in those
24 areas that we really concentrate most of that
25 information.

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1 Q. When you talk about the broad scope, you're
2 talking about that statement or scope statement that
3 was prepared in 1994?

4 MR. NUNLEY: Objection.

5 A. I can't remember the date when the scope
6 statement was prepared, but there was a scope
7 statement used in the general collection at the
8 beginning of the collection for this case.

9 Q. And that was before Exhibit 1300 was served; is
10 that correct?

11 A. That's correct.

12 Q. So my question is: Was anyplace other than the
13 areas in Richmond that you've mentioned specifically
14 searched for documents responsive to Exhibit 1300?

15 A. I believe that any documents that might have
16 been identified under the broad search were
17 considered when we were making this production, but
18 in order to speak to the people who know the most
19 about these documents, they held those meetings
20 because those are the people who would generate and
21 maintain basically what these documents are.

22 Q. What were the security arrangements for these
23 documents in Richmond?

24 MR. NUNLEY: Do you mean prior to
25 collection?

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1 MR. GORDON: Right.

2 A. Prior to collection how were they maintained?

3 Q. Right.

4 A. As far as I know, all of the formula
5 information, all of the ingredient information, all
6 of the processing specs are maintained on site in
7 safes or locked files and are available to a very
8 limited number of people. They are never sent to
9 off-site storage, so there wouldn't be copies of all
10 of those in central files or in any of our storage
11 facilities.

12 Q. Who had access to them during December of 1996?

13 A. How do you mean "access"? Generally speaking --

14 Q. Yes.

15 A. -- who would have access to them? The
16 individuals who needed to work with them.

17 Q. Who would that be?

18 A. The ingredient --

19 MR. NUNLEY: Could I -- well, objection as
20 to the -- to the form. When you say "access to
21 them," just I'd like for the record to be clear who
22 has access to which of the documents.

23 MR. GORDON: I would like to be clear on
24 that too.

25 MR. NUNLEY: But no, as you asked it,

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1 Corey, it -- it read as though her answer might be
2 that everyone has access in the list that she gives.
3 I don't think that's the case.

4 THE WITNESS: No, that's not the case.

5 A. Counsel also had access insofar as trying to
6 help us -- during this time period to help us collect
7 the documents, but the information is segmented more
8 or less.

9 The ingredient information would be available in
10 the product integrity department, largely to David
11 Williams. The flavor information would come from the
12 flavor technology group and is held in a locked safe
13 in Elmore Cooke's office. The processing specs would
14 come from Jim Huchison in the leaf department, and
15 they're held in a locked file cabinet in his office.

16 I'm sorry, Jim is one who I forgot to mention
17 earlier having spoken with.

18 MR. NUNLEY: And I think -- I don't know if
19 you finished, but you've got the leaf department.

20 A. And Brad Scott might hold blend information.

21 Q. Where would information about the reconstitution
22 process be?

23 A. There would be processing specs on that
24 process.

25 Q. That would be Jim Huchison's area?

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1 A. Yes, he -- he has the processing specs for the
2 most part.

3 Q. What's the difference between ingredients and
4 flavor?

5 MR. NUNLEY: Objection as to form.

6 Q. In -- in terms of the documents that -- that
7 would be in those two areas.

8 A. In -- in terms of the way I described the
9 differences of where the information is held, the
10 flavor technology group where Elmore Cooke is, they
11 develop flavors and they do some process feasibility
12 and they develop the -- the actual sort of flavor
13 recipes. But David Williams' area has the vendor
14 disclosures that tell you what's in a flavor, so I
15 refer to the ingredients as being from David
16 Williams' area and the flavors as being from Elmore
17 Cooke's area.

18 Q. Who was --

19 Who was responsible for providing the list to
20 the federal government of ingredients used in
21 cigarettes?

22 MR. NUNLEY: Objection as to form, vague.

23 A. The compilation of the annual HHS list is
24 completed in product integrity, David Williams'
25 area.

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1 Q. With respect to the leaf blend documents, has
2 Philip Morris produced complete leaf blend
3 information for every cigarette sold in Minnesota
4 from 1954 to 1994?

5 MR. NUNLEY: Objection as to form.

6 A. Philip Morris has produced documents sufficient
7 to disclose the information requested in the
8 December 16th request, including leaf information.

9 Q. How did you determine that?

10 A. I met yesterday with counsel and went through
11 the types of documents with some specificity with Ken
12 Houghton. I also discussed the meetings and the
13 point of those meetings that I mentioned earlier with
14 Cliff Lilly. I also interviewed Brad Scott and asked
15 him what he knew about what was produced.

16 All of them told me that they feel that given
17 the information that was pulled together to answer
18 the December 16th request, that you have everything
19 asked for.

20 MR. NUNLEY: And, Mr. -- Mr. Gordon, on
21 that point, there's something I'd like to say out of
22 the presence of the witness, not now, but I'd like
23 to -- to do it at the end of the deposition because I
24 think that -- well I think there's a letter on that
25 point.

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1 MR. GORDON: Okay.

2 Q. What was Ken Houghton's involvement in the
3 Category II collection?

4 A. I don't know.

5 Q. How was it that you were talking to him
6 yesterday?

7 A. He and I were both in the building across the
8 street in prep sessions and decided to spend some
9 time talking about some of the Cat II while he was
10 there.

11 Q. Did he give you any information about the
12 Category II or did he just happen to be there when
13 you were discussing it with others?

14 A. He was there, and basically I -- it was helpful
15 for me to spend some time going through those types
16 of documents. I don't normally see them in my
17 general work, in my normal job, so Ken was a little
18 bit more familiar with some of the documents, and I
19 wanted to make sure I understood what they were.

20 Q. Did you actually look at Category II documents
21 yesterday?

22 A. Yes, we --

23 MR. NUNLEY: Well I'll let her answer that
24 question, but I think, Mr. Gordon, you're getting
25 into an area of work product in terms of the

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1 documents I've selected for the witness to review in
2 preparation.

3 A. Yes, I looked at some.

4 Q. Had you ever seen them before yesterday?

5 A. No. I had asked occasionally during the course
6 of the interviews that I conducted if someone would
7 show me where their files were, these locked files
8 that they keep. I specifically recall Jim Huchison
9 unlocking the area to show me where he kept his
10 files. I wanted to make sure that they had all been
11 Bates stamped.

12 Q. Okay. But you didn't actually look at the
13 content of the documents --

14 A. No.

15 Q. -- at that time?

16 So the only time you've ever actually seen any
17 Category II documents was yesterday?

18 MR. NUNLEY: Objection as to form,
19 mischaracterizes her prior testimony.

20 A. No, I don't think that's entirely accurate.

21 Q. Okay. What --

22 Where is it inaccurate?

23 A. Well I know that I saw some yesterday. I may
24 have seen some earlier. I was involved, as I told
25 you last March, in the review at outside counsel for

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1 confidentiality purposes. Occasionally it could
2 happen that a document slipped through the process,
3 and if so, we tried to make sure that before it was
4 produced there was a review done at outside counsel.
5 And so I was involved in some of those.

6 Q. So --

7 A. I also may have seen some in the course of
8 preparing for this or other depositions.

9 Q. But if you saw it, it was in connection with
10 something else as opposed to specifically looking at
11 Category II formula documents in order to prepare
12 yourself for this deposition other than yesterday; --

13 MR. NUNLEY: Objection as to form.

14 Q. -- correct?

15 MR. NUNLEY: Excuse me. Objection as to
16 form.

17 A. If I follow that question properly, I think the
18 answer is no, that I -- I actually did also while I
19 was in flavor technology ask to see what they were
20 talking about when they were describing the records,
21 where they keep them.

22 Q. And were you shown some documents?

23 A. I was shown, "This is what one looks like.
24 Here's where we keep it."

25 Q. Okay. Just as an example?

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1 A. Right.

2 Q. Okay. What did it look like?

3 A. It looked like a sheet with a lot of codes on
4 it.

5 Q. Did you ask how one would go about translating
6 those codes?

7 A. Not specifically. I asked a little bit about
8 how they're used, how people know what they mean.

9 Q. And what were you told?

10 A. Generally I was told that they're used to mix up
11 the formulas. They're used either as pre-blend
12 concentrates or formulas to make what you might call
13 a sauce that goes on the tobacco, the flavors or the
14 after-cut or the casings.

15 Q. Do you have an understanding as to the
16 difference between after-cut and casings?

17 A. I have --

18 MR. NUNLEY: Let me -- excuse me. Just I'm
19 going to object to this line of questioning on this
20 basis: The notice is specific that you wanted
21 someone on the collection and production of
22 Category II documents. I had put you on notice when
23 we argued the issue of Category II that we did not
24 read the notice as requesting someone who could
25 interpret and explain necessarily the

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1 interrelationship, that we were prepared to make
2 someone of that type available to you, but we do not
3 read the Category II 30.02(f) as requiring that.

4 You -- there was no movement made by the
5 plaintiffs to change that, so I don't believe this
6 witness is properly required to answer this line of
7 questioning. I'm certainly not going to stop it, but
8 I'll put you on notice that I think it's outside and
9 will object to any attempt by you to characterize
10 this as 30.02(f) on the issue of the
11 interrelationship and working of Cat II ingredient
12 documents.

13 Q. Do you remember my question?

14 A. I'm sorry, I don't.

15 Q. Do you understand the difference between
16 after-cut and casing?

17 A. I have a general understanding based on my
18 personal knowledge having been at the company for
19 some time.

20 Q. What's your general understanding?

21 A. A casing is a sauce that goes on the tobacco
22 before it's cut, and after-cut goes on after it's
23 cut.

24 Q. Are you aware of any other sauces that are used
25 in the cigarette manufacturing process?

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1 MR. NUNLEY: Objection as to form. How do
2 you mean "any other sauces"?

3 Q. Is something --

4 Is there anything besides casings or
5 after-cuts?

6 A. Well there --

7 MR. NUNLEY: Same -- excuse me. Same line
8 of objection to this question. Or excuse me, same
9 objection to this line of questioning.

10 A. Yeah, I'm not an expert in -- in the
11 processing. I know that there are things we call
12 casings and after-cuts. The flavor group also works
13 on concentrates.

14 Q. Is that something that's -- that's applied to
15 cigarettes other than as a casing or as an
16 after-cut?

17 MR. NUNLEY: Same objection.

18 A. I don't know. I -- my basic knowledge is that
19 the concentrate is something that is sort of a
20 pre-blend -- it's a concentrate that then can be
21 added to, and my understanding is -- general
22 understanding, personal knowledge only, is that it
23 winds up as a casing or an after-cut.

24 Q. So in general, it's your understanding that the
25 sauces that are used in the manufacture of cigarettes

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1 are either casings or after-cuts; --

2 MR. NUNLEY: Same --

3 Q. -- is that correct?

4 MR. NUNLEY: Excuse me. Same objection.

5 A. Based on my personal knowledge, that's about as
6 much as I know about it, yes.

7 Q. And it's your understanding that Philip Morris
8 has produced documents that show all the casings used
9 in cigarettes sold in Minnesota?

10 A. It's my understanding that Philip Morris has
11 produced documents sufficient to show all of the
12 flavors used -- did I say "flavors"? Excuse me. All
13 of the specs, all of the ingredients and all of the
14 formula for documents sold during that time period.

15 MR. NUNLEY: You said -- you said "for
16 documents."

17 A. I'm sorry. For cigarettes --

18 Q. My specific question --

19 A. -- sold domestically during that time period.

20 Q. My specific question goes to the issue of
21 casings. Is it your testimony that Philip Morris has
22 produced documents sufficient to show each and every
23 casing used on cigarettes sold in Minnesota from 1954
24 to 1994?

25 A. I believe so, yes.

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1 Q. And what's the basis of that belief?

2 A. It's my understanding that that would be -- that
3 a casing would necessarily be covered in
4 specifications, ingredients and full formula for any
5 of those cigarettes.

6 Q. I believe you told me that you had had -- was it
7 David Williams show you an example of a -- of a
8 flavoring document?

9 A. No, not David Williams.

10 Q. I'm sorry. Who was it?

11 A. Greg Nixon.

12 Q. And what is Mr. Nixon's title?

13 A. I'm sorry, I don't recall, but he's in the
14 flavor technology group.

15 Q. And would it be the flavor technology group that
16 would be responsible for the -- the casings and the
17 after-cuts?

18 A. They make the flavor formulas, so basically I
19 think they would develop the formulas there, yes.

20 Q. Okay. Did you do anything to determine if
21 Philip Morris collected and produced doc -- documents
22 sufficient to show each and every casing used on
23 Philip Morris cigarettes sold in Minnesota?

24 MR. NUNLEY: Objection, asked and
25 answered.

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1 A. Yeah, I -- I think a casing -- and -- and I may
2 have overemphasized the use of the word. It's not a
3 common term, but I think a casing is sort of a subset
4 of this information, so it would have been included.

5 Q. So basically, you just asked if Philip Morris
6 had produced all documents necessary to show the
7 formula; is that right?

8 A. Well I asked each time, specifications,
9 ingredients and formula, yes.

10 Q. And you didn't yourself try and find out what
11 the different elements of the specifications,
12 ingredients and formula would be; is that correct?

13 A. I didn't spend a lot of time trying to become an
14 expert in that area, no.

15 Q. Okay. So you just took it on -- well strike
16 that.

17 So when you sought out this information, you
18 didn't yourself try to determine whether all the
19 items that go into making up the formula or the
20 ingredients for a cigarette were searched for,
21 collected and produced; is that correct?

22 MR. NUNLEY: Objection, --

23 A. No, that's not correct.

24 MR. NUNLEY: -- mischaracterizes her prior
25 testimony.

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1 Q. How did you go about doing that?

2 A. I interviewed people in each of the areas where
3 the records would come from and I asked them about
4 the thoroughness of the search and I asked them about
5 the process, how they determined which would be
6 included. And in each of those areas I was told that
7 it was a very thorough search and that the documents
8 that were pulled together in response to this request
9 were sufficient to show all of that information
10 during that time period.

11 Q. Okay. So it's your testimony that there are no
12 missing pieces for the ingredients, specifications or
13 formula?

14 A. By "missing pieces," what do you mean?

15 Q. Some gap in knowledge, something where they were
16 not able to locate a document sufficient to
17 demonstrate a particular ingredient or a particular
18 casing or a particular blend formula for a particular
19 cigarette for a given year.

20 MR. NUNLEY: Well objection as to form. I
21 think it mischaracterizes our obligation. We had an
22 obligation to produce those documents in our
23 possession sufficient to show. I think your question
24 suggests something else, and on that basis I'd
25 object.

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1 A. So how does that question go again?

2 Q. You asked me to define what I meant by "missing
3 pieces." Do you recall my definition of that?

4 A. It was a little wordy, but I think -- I think I
5 do.

6 Q. Okay. Is it your testimony that there are no
7 missing pieces for the specifications, ingredients
8 and full formula?

9 MR. NUNLEY: Objection as to form.

10 A. We produced information that we had. It's
11 possible that earlier, in earlier years, that the
12 information was kept differently, but I don't think
13 we've missed any information that we had. We
14 produced everything that we had to -- that would be
15 sufficient to disclose that.

16 Q. I appreciate that you produced everything that
17 you had. What I'm trying to determine is if you'd
18 made any effort to determine whether what you had was
19 sufficient to show that all the specifications,
20 ingredients and formula for all cigarettes sold in
21 Minnesota or whether there were some missing pieces.

22 MR. NUNLEY: Let me make sure I understand
23 the question. Are you saying missing pieces that
24 Philip Morris had that it didn't produce or
25 information that it -- documents it didn't have?

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1 MR. GORDON: Either.

2 MR. NUNLEY: Well objection as to the
3 second -- first of all, objection as to form if it's
4 either, but second, objection to the second part
5 because that -- Corey, as far as I know, that assumes
6 an obligation on a litigant that -- that no litigant
7 bears.

8 MR. GORDON: Well, you know, Chip, the case
9 management order still applies. I understand this
10 is -- this is basically a document-collection
11 deposition, but your objections have been way beyond
12 the case management order. I'm trying to move this
13 along, and I've -- and I've sat through some very
14 lengthy prompting objections. Let's go back to
15 the -- to the case management order.

16 MR. NUNLEY: Well no, let's --

17 MR. GORDON: Make -- make your objection as
18 to form and --

19 MR. NUNLEY: Corey, first of all --

20 MR. GORDON: -- let's move on.

21 MR. NUNLEY: -- don't characterize my
22 objections as prompting. If you're going to ask a
23 question of the witness to put before the jury a
24 suggestion on a litigant that the -- as an -- in
25 terms of an obligation the litigant doesn't bear,

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1 then I will give you more than a simple speaking
2 objection. I will give you the basis for the
3 objection because I think when you do that, you're
4 exceeding your obligations under the case management
5 order.

6 BY MR. GORDON:

7 Q. Okay. Ms. Purcell, my question is whether you
8 did anything to determine whether in searching for
9 documents to pro -- to respond to the requests set
10 forth in Exhibit 1300 Philip Morris discovered that
11 it lacked information for a particular cigarette, for
12 a particular year, for a particular ingredient,
13 anything like that.

14 MR. NUNLEY: Objection as to form,
15 compound.

16 A. I interviewed the people who would know the most
17 about these documents. Each of them told me that it
18 was a thorough review, that any documents that they
19 had that were relevant were collected, and I believe
20 that if they were responsive, they were also
21 produced. I am aware that sometimes the form of
22 those documents might have changed in the time period
23 from 1954 to 1994 or the present.

24 Q. Okay. My question is not whether they produced
25 everything they had, but whether you did anything to

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1 determine whether there was anything missing.

2 MR. NUNLEY: Objection as to form.

3 A. I'm sorry, I didn't specifically ask what was
4 missing because we have collected everything that we
5 had, everything that we used.

6 Q. So you did nothing to determine whether in this
7 collection process Philip Morris determined that it
8 lacked documents on a particular specification or
9 ingredient or formula for the -- for cigarettes sold
10 in Minnesota?

11 MR. NUNLEY: Same objections, and again I
12 think that you're -- you're attempting to create an
13 obligation that Philip Morris doesn't have.

14 A. Actually, Mr. Gordon, no, I wouldn't say I did
15 nothing. I said I didn't ask that specific
16 question. I asked the other side of it, did we
17 review everything we had, did we try to get
18 everything that was available that we knew of that we
19 had that would be sufficient to disclose this
20 information and did we make that available to counsel
21 so that it could be produced, and the answer in each
22 area I asked was yes.

23 Q. Okay. But you never asked if the information
24 that you had actually was sufficient to demonstrate
25 specifications, ingredients and full formula;

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1 correct?

2 MR. NUNLEY: Objection. That
3 mischaracterizes her testimony.

4 A. Yeah, I may -- I may have lost it a bit on that
5 question because I think that is what I asked, did we
6 do what we were required to do to meet this request.

7 Q. I understand that you -- it's your testimony you
8 went to these people and said, "Did we look for and
9 produce everything we had?" and that everybody said,
10 "Yes, yes, we produced everything we had that was
11 responsive." That's right?

12 A. That's correct.

13 Q. Okay. My question is: Did you do anything to
14 determine if in searching for documents any of these
15 people determined that for whatever reason there was
16 a gap in knowledge or a gap in the documents with
17 respect to any of these things?

18 A. I'm not specifically aware of anyone telling me
19 that there were gaps in knowledge, but that there
20 were changes in the way the information may have been
21 held or compiled over the years.

22 Q. Okay. Did you ask anyone if there were any
23 gaps?

24 A. I didn't ask that specific question, no.

25 Q. Okay. So if, for example, for whatever reason

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1 the leaf blend formula for the 1959 Philip Morris
2 Commander cigarette was not in the files, you don't
3 know whether in searching for the leaf blend formulas
4 it was determined that they couldn't find the 1959
5 Philip Morris Commander cigarette or not; --

6 MR. NUNLEY: Objection as to --

7 Q. -- is that correct?

8 MR. NUNLEY: Excuse me. Objection as to
9 form.

10 A. I personally did not ask all of them to walk me
11 through the entire collection and production for
12 this -- to respond to this request, but I did each
13 time ask anyone, "Were there any issues that you
14 turned up with that are unresolved?" and no one
15 mentioned that they were missing any pieces.

16 Q. But you didn't specifically ask them if there
17 was any missing information?

18 MR. NUNLEY: Asked and answered.

19 A. I don't recall specifically asking that
20 question, that's correct.

21 Q. So you are not capable of testifying here today
22 whether or not Philip Morris has produced documents
23 that in fact demonstrate all the specifications, all
24 the ingredients and all the formulas for cigarettes
25 sold in Minnesota?

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1 MR. NUNLEY: Same objection. Mr. Gordon, I
2 think again to the extent you like to chastise me
3 about exceeding the case management order, I think
4 you here are exceeding your obligations as a
5 questioning attorney to frame your questions
6 properly. I think you're suggesting an obligation
7 that, to my knowledge, no litigant in this case
8 bears.

9 A. I think I can answer your question, Mr. Gordon,
10 by telling you that I have checked with all of the
11 people who were involved in that initial meeting when
12 we received this request, all of the people who I
13 listed for you, and each one of them has told me that
14 they did a diligent and thorough search, that they
15 tried their best to make sure that we had all the
16 information we needed to respond to this request.
17 And I was told by Cliff Lilly and by Ken Houghton
18 that in fact looking at some of that information
19 would give you everything you needed.

20 Q. You understand you're testifying here today as a
21 spokesperson for Philip Morris; correct?

22 A. Yes, I do.

23 Q. And you understand that your obligation here is
24 to testify as the person most knowledgeable on behalf
25 of Philip Morris with respect to its collection of

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1 Category II information?

2 A. That's correct.

3 Q. And you understand that in December of 1996, as
4 set forth in Exhibit 1300, plaintiffs -- plaintiffs
5 asked for documents sufficient to disclose all the
6 specifications, all the ingredients and the full
7 formula for each and every cigarette sold by Philip
8 Morris in Minnesota from 1954 until 1994? You
9 understand that?

10 A. That's correct.

11 Q. Okay. My question is: Did Philip Morris do
12 that?

13 MR. NUNLEY: Well I'm going to renew my
14 objection. To the -- to the extent what you're
15 trying to do is have her explain how the documents
16 fit together, that's one basis of the objection, and
17 the second basis of the objection is what I've
18 repeatedly said. You are mischaracterizing,
19 Mr. Gordon, what our obligations were under that, and
20 I think that's inappropriate and unfair to the
21 witness.

22 MR. GORDON: Well, Chip, I -- I -- I don't
23 want to engage in a long colloquy with you, but I'm
24 not asking the witness whether Philip Morris did or
25 didn't fulfill its obligations. I want to know if

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1 Philip Morris produced all formula information or if
2 there are gaps.

3 MR. NUNLEY: That --

4 MR. GORDON: This is the wit -- just a
5 minute.

6 This is the witness who's been produced as the
7 most knowledgeable person on the collection. I
8 understand that she's -- her testimony is going to be
9 over and over again that Philip Morris did everything
10 it was supposed to do and produced everything it
11 had. I want to know if there was anything Philip
12 Morris didn't have. I want to know if there are any
13 gaps, and this is the person who's been produced as
14 the person most knowledgeable.

15 And I don't -- I don't care how many times I
16 have to keep asking the question. I want to know
17 if -- if it's Philip Morris's testimony that it has
18 given the plaintiffs each and every formula, each and
19 every specification and each and every ingredient for
20 each and every cigarette.

21 MR. NUNLEY: Corey, I think Philip Morris's
22 obligation was to produce those documents in its
23 possession that responded to one or two. This
24 witness is here to tell you whether or not Philip
25 Morris did that.

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1 If you're asking this witness to -- to look
2 behind what may -- in 1958 what may have been
3 missing, and then I don't know what you're
4 suggesting, that we go out and then attempt to get
5 documents when we don't have them.

6 MR. GORDON: No, Chip, just tell me.

7 MR. NUNLEY: Tell you what?

8 MR. GORDON: That's -- that's why we're
9 here. I'm not -- I -- I didn't come to New York,
10 hire a court reporter to sit here and ask the witness
11 if Philip Morris fulfilled its obligations. That's
12 not -- you know, I -- I -- I -- I -- I -- I'm not
13 stupid. I'm not going to waste my time.

14 My question -- my whole point in -- in examining
15 this witness and my whole point in doing a 30.02(f)
16 examination of a witness is to find out what Philip
17 Morris did produce and what it wasn't able to find
18 and what it -- what it wasn't able to produce.

19 MR. NUNLEY: Well I --

20 MR. GORDON: And it's a very simple
21 question, do -- has Philip Morris produced every --
22 each and every specification, each and every
23 ingredient and each and every formula.

24 MR. NUNLEY: And you have -- Corey, I think
25 you've clearly demonstrated the problem. You've not

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1 properly asked for a witness to testify about what
2 you want. You've asked for a witness to testify
3 about Category II collection and production. She's
4 testified precisely as to that, Philip Morris's
5 collection of those documents and production.

6 Now you're asking her as to the ingredient
7 portion of it, whether this witness can look at
8 the -- the ingredient portion that we've produced,
9 which you know is a lot of documents, and tell you
10 whether there is a formula missing here or there is
11 a -- an ingredient missing there, and I think that's
12 outside what you've asked for her to do. What she
13 can tell you is what we did to respond to these, the
14 collection and production of Category II. I think
15 she's done an extremely capable and fine job of doing
16 that so far.

17 To the extent you've -- you've failed to ask the
18 appropriate -- or make the appropriate designation, I
19 mean, you know, whether you've come to New York and
20 hired a court reporter or not, you're the master of
21 your designations. We raised this as an issue when
22 we argued Category II. She's here to tell you what
23 we did to -- to comply with -- with what you have in
24 front of her now, which is the December 16th
25 request.

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1 MR. GORDON: And I want to make it very
2 clear on the record that our purpose in conducting
3 this 30.02(f) deposition is not to give an
4 opportunity for Philip Morris to embark in a
5 self-laudatory and self-congratulatory soliloquy
6 about all the wonderful things it did to collect
7 documents. The sole purpose of this deposition is to
8 find out if there's anything missing.

9 MR. NUNLEY: Well then if that --

10 MR. GORDON: And -- and -- and we noticed
11 the person most knowledgeable about the collection and
12 production of Category II documents, and I -- I think
13 the record is clear but I just want to make it
14 abundantly clear that this person who has been
15 produced in response to this 30.02(f) notice does not
16 have any information as to whether or not there are
17 any gaps in the documents that have been produced.

18 MR. NUNLEY: Corey, I think --

19 MR. GORDON: And I want -- just a minute,
20 Chip.

21 MR. NUNLEY: Certainly.

22 MR. GORDON: I want to make it very clear
23 on the record that we do not believe this complies
24 with the 30.02(f) production. The whole point of our
25 conducting an examination here is to determine if

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1 there is anything missing.

2 MR. NUNLEY: Well, Corey, if -- you could
3 have asked, you could have designated or requested a
4 designation on that topic. You haven't. You asked
5 for a witness to testify about our collection and
6 production, which necessarily means documents in our
7 possession. She is here to testify about what we did
8 to collect and produce documents in our possession.

9 Now you're asking this witness to convert
10 herself into some flavor and ingredient expert and
11 look at a production from 1954 to 1994, 40 years'
12 worth, and tell you whether anything is missing. I
13 think that is patently ridiculous and ludicrous.

14 MR. GORDON: Well, you can tell that to --
15 to Judge Fitzpatrick. His --

16 MR. NUNLEY: I'll be prepared to do exactly
17 that.

18 MR. GORDON: Please let me finish.

19 MR. NUNLEY: I've told you before that I
20 was prepared to sit down with you and go through
21 Category II production. I've told the court that.
22 You have never asked to do that, so if you're -- if
23 you're unhappy with the witness you have here today,
24 your unhappiness springs from your own failure to
25 properly request a witness on the issue you wanted

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1 testimony.

2 This witness is here and able to testify about
3 the requests that you've made, and she's done that.

4 MR. GORDON: And as I was trying to say
5 before you interrupted me, Chip, it's our position
6 that Philip Morris has not complied with the 30.02(f)
7 notice, and we intend to seek appropriate remedies
8 because the whole point of examining a witness most
9 knowledgable is to determine not only what has been
10 produced but what might not have been produced, not
11 because of anything nefarious but because there were
12 no documents available on a particular issue. And
13 it's clear Philip Morris has not produced a witness
14 who's knowledgable on that -- that aspect of the
15 collection and production process.

16 BY MR. GORDON:

17 Q. Ms. Purcell, how were documents assembled for
18 Bates stamp numbering?

19 A. Bates stamps were applied -- we're talking about
20 Category II documents?

21 Q. Right, just the Category II documents.

22 A. Bates stamps were applied in a secured area
23 where the documents were collected, where the copying
24 was being done.

25 Q. How was it determined the order in which

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1 documents would be assembled and then stamped?

2 A. I don't think I understand the question.

3 Q. What's the relationship of -- of the -- of the
4 sequence of documents, if any?

5 MR. NUNLEY: Objection as to form.

6 A. Yeah, I'm sorry, I don't understand that
7 question.

8 Q. Well the documents are numbered in some
9 sequential order; is that correct?

10 A. Yes, the documents are numbered Bates stamped.

11 Q. Who put the documents in a pile in order for
12 them to be Bates stamped sequentially? How was that
13 done?

14 A. The entire copying and Bates-stamping process
15 was done on site for Category II documents by teams
16 of outside counsel personnel.

17 Q. So the documents were collected from whatever
18 areas they were collected from and brought into a
19 single room; is that correct?

20 A. Several rooms.

21 Q. Okay. And how were -- were they then put in the
22 line for Bates numbering?

23 A. I believe in order of production.

24 Q. What --

25 A. We were working constantly to produce

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1 documents. As documents became available and were
2 ready to be go -- to put -- be put into the room
3 where they were being worked with by counsel, I think
4 it was a first-in system.

5 Q. Is it your testimony that all documents
6 collected from a single area were sequentially
7 numbered?

8 A. No, I don't know if that's accurate.

9 Q. Okay. Is it in fact the case that at times
10 documents were collected from a single area but were
11 separated and Bates numbered out of sequence?

12 MR. NUNLEY: Objection as to form.

13 A. Documents may have been Bates numbered in -- at
14 separate time periods from a singular area.

15 Q. How did that come about?

16 A. Well I think it could come about in a number of
17 ways, but mainly I think we were trying to meet
18 certain requests, and it's possible that you could
19 have documents from one area that meet one request
20 and documents from that same area that meet a
21 separate request.

22 Q. Okay. If documents were pulled at one time, is
23 it your testimony that those documents pulled at the
24 same time from a single area were numbered --
25 numbered sequentially?

1 MR. NUNLEY: Objection as to form.

2 A. I don't think they were always necessarily done
3 that way.

4 Q. Okay. Were there circumstances where documents
5 pulled all together at the same time from a single
6 area were separated and Bates numbered out of
7 sequence?

8 A. As I said, they may have been Bates numbered
9 separately if certain parts of the documents from
10 that singular area were responsive to one request
11 while others might have been responsive to another
12 request.

13 Q. Is it your testimony that the Category II
14 formula documents that have been produced by Philip
15 Morris were intended to be responsive to different
16 requests?

17 A. Well you have two here, so are we talking about
18 just the Category II documents that respond to this,
19 to the December 16th document requests?

20 Q. Well I'm -- I'm asking you about all the
21 Category II documents that have been produced by
22 Philip Morris. Is it your testimony that any given
23 document was intended to be responsive to one or
24 another of a specific request as opposed to this
25 document is responsive to the Category II formula

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1 requests in total?

2 MR. NUNLEY: Objection as to form.

3 A. I'm sorry, I didn't understand that question at
4 all.

5 Q. Okay. You understood in the non-Category II
6 production that documents were collected and produced
7 pursuant to specific requests; correct?

8 A. That's correct.

9 Q. For example, a particular document might have
10 been responsive to, say, Request Number 72, and in
11 the 4A index it would say, "This is responsive to
12 Request Number 72"; is that correct?

13 A. Okay.

14 Q. Okay. Is it --

15 Is that the same with Category II; in other
16 words, all the documents that were produced by Philip
17 Morris, the index should re -- should indicate which
18 specific requests they were being produced to?

19 A. As far as I know, there was an index that was
20 followed the same way as the general production,
21 yes.

22 Q. And is it your testimony that that index
23 indicates which of the specific requests it was being
24 responsive to?

25 A. As far as I know, yes.

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1 Q. Okay. So you don't know -- strike that.

2 If I were to tell you then that all the
3 Category II documents were simply produced as formula
4 documents re -- responsive to all of the formula
5 requests, that would -- that would be inconsistent
6 with your understanding; is that correct?

7 MR. NUNLEY: Objection as to form. I don't
8 know what you mean by that question.

9 A. I'm sorry, I don't know what you mean by that
10 question either. Could we try it again?

11 Q. Philip Morris has produced several hundred
12 thousand pages of Category II documents; is that
13 correct?

14 A. I recall a number at about 60,000.

15 Q. I'm sorry, that's right. I'm thinking of all
16 the defendants.

17 So Philip Morris has produced something on the
18 order of 60,000 pages of Category II documents; is
19 that correct?

20 A. That's about right.

21 Q. Okay. And it's your testimony, it's your
22 understanding that Philip Morris in producing those
23 has intended to segregate out which of those
24 documents were responsive to specific requests as
25 opposed to simply producing 60,000 documents and

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1 saying, "Here, these are the formula documents"?

2 A. I believe that there --

3 MR. NUNLEY: Objection as to form. Excuse
4 me, Ms. Purcell.

5 A. I believe that there were some requests earlier,
6 before December 16th, that would have turned up
7 documents that were Category II documents, so in
8 order to respond to those requests and to respond to
9 the December 16th requests, we may have -- they may
10 be -- may have been done at slightly different time
11 periods. So to go back to your numbering and
12 designating, they may be done slightly differently.

13 Q. What was done to respond to the September 4
14 court order?

15 MR. NUNLEY: September 4, 1997?

16 MR. GORDON: Right.

17 A. Well we did a number of things. There's still
18 work ongoing. Without it in front of me, I may not
19 remember all of them and I'm sure I won't remember
20 all of it. Would you like -- like me to try to
21 remember what we were asked to do in that order, or
22 do you have a copy?

23 Q. I'd like you to tell me everything that Philip
24 Morris has done to respond to the September 4, 1997
25 court order.

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1 MR. NUNLEY: Could you put the order in
2 front of her so she won't have to go by memory as to
3 what we're required to do?

4 MR. GORDON: I don't have it, but if you
5 want -- you --

6 Q. Do you recall the September 4 order that came
7 out 19 days ago?

8 A. I recall the order. I may not remember
9 everything that's asked for in it. I can try from
10 memory to tell you what I know was in it. Would you
11 like me to do that?

12 Q. Sure.

13 A. Okay.

14 MR. NUNLEY: Well objection. I mean, I
15 think it's something you ought to put in front of the
16 witness, but as long as the record's clear she's
17 doing it from memory and not -- without the document
18 in front of her, she can do that.

19 A. Okay. Well as I said, I know that there's been
20 a lot of work ongoing with people in the company and
21 outside counsel since -- and in-house counsel since
22 that order came in, so I may not be aware of
23 everything that's currently going on. I know that
24 that order requested information on any ingredient
25 lists as well as work-product files; that is

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1 information that we produced to you yesterday.

2 I know that it requested information on a
3 computer model. I believe that work compiling that
4 information is ongoing and will be produced. I
5 believe it requested information on files from
6 INBIFO, and I know that we have identified those
7 files.

8 Q. I -- I'm going to stop you there because there
9 were a number of other issues that go beyond the
10 Category II issues, and I specifically want to focus
11 on the ingredient lists, the work-product and the
12 computer model issues. Tell me everything Philip
13 Morris has done to find ingredient lists, work
14 product or computer models.

15 A. Well as I said, I may not know everything, but I
16 can -- I do know that the ingredient lists by and
17 large would be held in David Williams' area, that
18 David Williams was involved in a project that was
19 work product that involved ingredient lists or
20 information on ingredients. All of that information
21 has been compiled. I know that there were outside
22 counsel teams in David's office in the past few weeks
23 going through everything that he had, checking on the
24 work-product information as well as any ingredient
25 lists that might have been reviewed before and that

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1 that information was compiled and delivered to you
2 yesterday.

3 Q. What was the project David Williams was working
4 on?

5 A. I know of it as something called the Brand
6 History Project.

7 Q. When was that project begun?

8 A. I don't know exactly when.

9 MR. NUNLEY: Objection, foundation.

10 A. I'm sorry, I don't know when it was begun, but
11 it is still, as far as I know, in development.

12 Q. Have --

13 Has brand history of any specific brand been
14 completed?

15 A. I don't know if it's been completed. I know
16 that the system is still in development and that they
17 don't rely on it yet for anything.

18 Q. Why was the Brand History Project undertaken?

19 MR. NUNLEY: Objection, foundation and
20 calls for attorney-client, work-product information.

21 THE WITNESS: Do I answer that one?

22 MR. NUNLEY: Can you answer it without
23 revealing anything you may have been told by
24 counsel?

25 THE WITNESS: Yes.

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1 A. It's my understanding that that was a project
2 which was begun at the request of in-house counsel.

3 Q. Does any --

4 Does Philip Morris maintain any of its formula
5 information on computers?

6 A. Well when you say "any of its formula
7 information," and there is some that's available on
8 computers.

9 Q. What was done, if anything, to access the
10 information stored on computers in order to respond
11 to plaintiffs' requests?

12 MR. NUNLEY: Let me -- let me just raise a
13 question here, Mr. Gordon, so the record is clear
14 because I think it will be unilateral. Is it your
15 position that Philip Morris has an obligation to pull
16 off from computer files documents that are not
17 printed to hard copy?

18 MR. GORDON: I'm not prepared to discuss
19 whether Philip Morris does or does not have that
20 obligation. I'm just here to find out what Philip
21 Morris did.

22 MR. NUNLEY: Well, I will tell you if
23 you -- if you go into this line of questioning, we'll
24 intend to do the same if we need to pull back your
25 witnesses to do exactly the same to find out if this

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1 type of inquiry has been done by the State and by
2 Blue Cross and Blue Shield.

3 MR. GORDON: I -- I -- I don't know what
4 you did or didn't do when you examined
5 document-collection witnesses, but I'm certain that
6 you could have asked them whether they did that or
7 not.

8 MR. NUNLEY: Well you're familiar with --
9 with electronic records and exclusions as to those,
10 and if you want to broach the topic here, you can do
11 that, but I just want to put you on notice we'll ask
12 for the opportunity to do the same with your
13 witnesses even if we need to pull them back.

14 MR. GORDON: Well, Chip, your -- your --
15 you've spent a lot of time talking here about
16 obligations and duty. I'm just trying to find out
17 from this witness, who's supposedly the most
18 knowledgeable about what Philip Morris did to produce
19 documents, I'm just trying to find out what Philip
20 Morris did or did not do.

21 MR. NUNLEY: I --

22 MR. GORDON: And I -- and I assume your
23 people were competent and able to ask those same
24 questions of our witnesses, and if you forgot to ask
25 them what they did or didn't do with respect to

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1 computer compilation, that's your problem.

2 MR. NUNLEY: Well if -- Corey, if you're
3 taking the position that it's always been an open
4 issue, I want to make -- I want that position taken
5 by you to be clear on the record, that it was an open
6 issue and that our -- if our people didn't go into
7 it, it was because they simply, I think you said,
8 forgot and not because we had some sort of an
9 agreement.

10 But if that's -- if that's your position, that's
11 fine, but realize it's reciprocal. As certainly you
12 and Ms. Walburn like to tell me in taking
13 depositions, as you did during Channing Robertson,
14 I'm telling you now this will be reciprocal.

15 MR. GORDON: Okay. And I've made -- I've
16 tried to make it clear, and if I didn't, now let me
17 make it very clear that I'm not taking any position
18 as to whether either side has any obligation to do or
19 not do anything with respect to any aspect of
20 document collection or production. That is not my
21 purpose in conducting this examination.

22 Whether Philip Morris, you know, went to -- took
23 out full-page ads in -- in newspapers in Brazil to
24 find formula, ingredients and specifications,
25 obviously Philip Morris would have no obligation to

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1 do that, but if Philip Morris did that, I'm entitled
2 to find that out. So that's my purpose in conducting
3 an examination, to find out what Philip Morris did or
4 didn't do.

5 MR. NUNLEY: Well --

6 MR. GORDON: And you can't infer from that
7 that we are taking a position one way or the other as
8 to whether Philip Morris should have or should not
9 have done anything.

10 MR. NUNLEY: Well, Corey, --

11 MR. GORDON: I simply want to find out what
12 Philip Morris did.

13 MR. NUNLEY: -- several times during
14 Channing Robertson's deposition you told me, prompted
15 by Mr. Wilson, that if I asked a certain line of
16 questions, that you wanted me to know that we would
17 be in essence opening the door there for mutual
18 inquiry. I'm just telling you the same thing. If
19 you do it here, I'm putting you on notice that you're
20 opening the door for mutual inquiry.

21 MR. GORDON: If you have any 30.02(f)
22 depositions of our people that you haven't yet taken
23 and you want to conduct a similar line of inquiry,
24 you're certainly free to do so.

25 MR. NUNLEY: No, I -- Corey, that's a --

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1 that's a nice attempted dodge, and let the record
2 reflect that Mr. Gordon is smiling like the cat that
3 swallowed the canary here thinking that his 30.2 --
4 30.02(f) depositions are over and now that we've
5 basically conducted ourselves in a way consistent
6 with certain agreements, that they can now breach it
7 and there will be no way for us to in essence take
8 advantage of the door being opened.

9 I want to put you on notice that if you do this,
10 we'll go to the court and ask for leave to bring back
11 your 30.02(f) witnesses and go into this same line of
12 inquiry.

13 MR. GORDON: Well you're certainly free to
14 go to the court and ask for whatever you want to
15 ask.

16 MR. NUNLEY: Good.

17 BY MR. GORDON:

18 Q. Do you remember the question?

19 A. No, I'm sorry, I don't.

20 Q. What was done, if anything, to accept -- to
21 access the information stored on computers in order
22 to respond to plaintiffs' requests?

23 A. As I mentioned to you last March, in each one of
24 the interviews based on the scope statement, counsel
25 discussed records broadly with all of the employees

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1 and covered to the degree necessary what was
2 available on computers, whether they printed it out,
3 where they kept their records.

4 Q. Okay. Were any documents produced in this
5 litigation printed from a computer database?

6 MR. NUNLEY: Objection. You need to be
7 more precise as to that question. You mean at any
8 time, at what -- when printed?

9 MR. GORDON: Start with anytime.

10 A. Well, Mr. Gordon, this is 1997. Most
11 information generally is on some kind of a computer,
12 whether it's a word processor or not, so I'm not sure
13 what you're looking for. You're looking for specific
14 databases?

15 Q. Well were there specific databases that
16 contained formula, ingredients or specification
17 information?

18 A. There are some, yes.

19 Q. Okay. And were any of these databases accessed
20 for purposes of producing documents responsive to
21 plaintiffs' request?

22 A. They were reviewed. They were reviewed with
23 counsel. I'm not sure what you mean by "accessed."
24 Most of those systems print reports or worksheets or
25 information, and that information was reviewed and

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1 collected, and if responsive, it was produced.

2 Q. How were the databases themselves reviewed?

3 A. With the people most knowledgeable about those
4 databases, with the IS departments and with counsel.

5 Q. Were any documents printed out from any

6 databases in order to respond to plaintiffs'

7 requests, any of plaintiffs' requests?

8 A. The documents that you received yesterday, the
9 full stack of documents were printed out. I know
10 that they were. I don't know if there is any other
11 specific production that we made of any existing
12 database records beyond that.

13 Q. Who made the determination as to what -- as to
14 the manner in which documents would be printed out
15 from the databases?

16 MR. NUNLEY: Objection as to form and to
17 the extent it calls for attorney client or work
18 product. Can you be more specific about your
19 question?

20 MR. GORDON: No. I just want to know who
21 made the decision.

22 A. I'm sorry, I don't -- I don't know which
23 decision you mean.

24 Q. You just told me that certain documents were
25 printed out in the stack that we received yesterday,

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1 and I want to know who made the decision which
2 documents to print out from which databases and how
3 to print them out.

4 A. I don't know. I believe that like most other
5 decisions would have been made with counsel and the
6 employees who were knowledgeable about the
7 information.

8 Q. Did you do anything to find out?

9 A. On the specific stack you received yesterday,
10 no.

11 Q. Yeah. Okay. So you don't know who made the
12 decision as to how to print out the information that
13 was produced yesterday?

14 A. Nothing specific. It's been our general
15 practice in litigation matters to consult with
16 counsel and employees in the company.

17 Q. Philip Morris uses flavors provided by
18 third-party vendors; correct?

19 A. Yes, we do.

20 Q. And those flavors are made up of various
21 chemical compounds; correct?

22 A. They're made up of ingredients, yes.

23 Q. And has Philip Morris produced complete
24 ingredients for each and every flavor which Philip
25 Morris has obtained from a third-party vendor and

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1 used in cigarettes sold in Minnesota?

2 A. I think we --

3 MR. NUNLEY: Objection for the same reasons
4 I've stated before.

5 A. I think, Mr. Gordon, that this is pretty much
6 the same question you were asking about the
7 December 16th request. We have produced everything
8 that we had sufficient to answer that request on
9 ingredients.

10 Q. So and you don't know whether Philip Morris has
11 complete formula information for all flavors from
12 third-party flavor suppliers?

13 A. I'm sorry, I'm mixing terms a little bit here.
14 Formula information from --

15 Q. In the cigarette industry, the outside
16 third-party flavor suppliers are -- are called flavor
17 houses; correct?

18 A. Sometimes, yes.

19 Q. And they have proprietary flavor ingredients
20 that they sell to cigarette manufacturers; correct?

21 MR. NUNLEY: I'm going to object to this
22 line of questioning. I think it's clearly outside
23 this witness's 30.02(f) obligations. She can -- she
24 can give you testimony, but it's not on behalf of
25 Philip Morris in her 30.02(f) capacity.

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1 A. I'm sorry, we're waiting for me now?

2 Q. Right.

3 A. What was the question?

4 Q. These flavor houses have proprietary flavor
5 formulas for the ingredients they sell to cigarette
6 manufacturers; correct?

7 A. It's my understanding that yes, they do.

8 Q. And the --

9 For example, a flavor house might sell a flavor
10 called Tobacco Flavor Number XYZ; correct?

11 MR. NUNLEY: Objection as to form.

12 A. It's my understanding that sometimes flavors are
13 coded and that they include ingredients and that the
14 information of what ingredients are in those flavors
15 would be available to the vendors who sell us those
16 in -- those flavors, yes.

17 Q. And my question is: Does Philip Morris have
18 sufficient information to know each and every
19 ingredient in every flavor that it obtained from a
20 third-party flavor house and used in cigarettes sold
21 in Minnesota?

22 MR. NUNLEY: Objection, clearly beyond the
23 scope of the 30.02(f) designation.

24 THE WITNESS: But I answer it?

25 MR. NUNLEY: Sure.

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1 A. Well based on my personal knowledge, I'm aware
2 that over the years the requirements that we may have
3 placed on our vendors as to what it is we needed from
4 them have changed, and currently we receive very
5 detailed information about ingredients, but earlier
6 that information may not as -- may not have been
7 available in the same format.

8 Q. So going beyond your personal knowledge, I want
9 your testimony on behalf of Philip Morris. Is it
10 your testimony that in responding to plaintiffs'
11 requests for all specifications, ingredients, full
12 formula for cigarettes, Philip Morris has or has not
13 produced documents sufficient to show the proprietary
14 formulas for the third-party flavor-house ingredients
15 used in all cigarettes sold in Minnesota?

16 MR. NUNLEY: Objection, asked and
17 answered.

18 A. It's my understanding that we have produced all
19 of the information we had available to us to meet our
20 obligations for that request.

21 Q. Right. And my question is: Does that
22 information demonstrate each and every ingredient in
23 each and every flavor-house formula used in
24 cigarettes sold in Minnesota from 1954 to 1994?

25 MR. NUNLEY: Mr. Gordon, I'm not going to

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1 go through my position on this line of questioning,
2 but I think you know that it's clear, and I object
3 because I think you -- your question assumes an
4 obligation that Philip Morris does not have and it
5 assumes an area of inquiry that you've not asked
6 for.

7 Q. Do you remember the question?

8 A. No, I'm sorry, I don't.

9 Q. Does the information provided by Philip Morris
10 in response to plaintiffs' requests set forth in
11 Exhibit 1300 demonstrate each and every ingredient in
12 each and every flavor-house formula used in
13 cigarettes sold in Minnesota from 1954 to 1994?

14 MR. NUNLEY: Same objections.

15 A. It's my understanding that the information
16 provided by Philip Morris in response to your request
17 on ingredient and formula information is everything
18 that we had, documents sufficient to show what we had
19 available to us, what documents we have.

20 Q. Is that information complete?

21 A. As far as I know, it's complete by way of what
22 we have.

23 Q. Is it complete in terms of what you used in the
24 cigarettes that you sold to Minnesotans?

25 MR. NUNLEY: Same objection. What was that

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1 last word?

2 MR. GORDON: "Minnesotans."

3 MR. NUNLEY: Thank you.

4 A. I'm sorry, I don't understand that.

5 Q. I -- I understand it's your testimony you've
6 produced everything you had. Does everything you
7 have show what you used in every cigarette you sold
8 in Minnesota?

9 MR. NUNLEY: Mr. Gordon, there's no reason
10 to raise your voice here.

11 MR. GORDON: I'm not raising my voice --

12 MR. NUNLEY: Well --

13 MR. GORDON: -- and the videotape is very
14 clear about that.

15 MR. NUNLEY: Yeah, it will be clear. But
16 the -- again you're exceeding what you've noticed in
17 your 30.02(f).

18 A. I'm sorry, Mr. Gordon, I'm -- I'm trying to be
19 clear with you. It's my understanding that the
20 format of the information that we received on
21 ingredients over the years changed. The format we
22 had it in and kept it in and maintained it in has
23 been provided to you.

24 Q. Okay. And there are periods --

25 There were periods of time when Philip Morris

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1 obtained flavor-house ingredients for which it did
2 not know the precise formula; correct?

3 A. I don't know if that's accurate.

4 Q. Who would know?

5 A. Well I would rely on our in-house scientists if
6 I had a question like that --

7 Q. And --

8 A. -- but --

9 Q. And in preparing for this deposition, you didn't
10 ask them that; correct?

11 A. I asked them if we made available everything we
12 needed to to give you sufficient documents to
13 understand the ingredients, formulas, specifications
14 for that time period.

15 Q. And with respect to the flavor-house
16 ingredients, you have no idea one way or the other
17 whether the information Philip Morris has in its
18 possession is complete; correct?

19 MR. NUNLEY: Objection as to form.

20 A. I'm sorry, I still don't understand your -- your
21 concept of complete. You have what we had.

22 Q. And is what you have complete?

23 A. Complete for what purposes?

24 MR. NUNLEY: Same objection.

25 A. What do you mean by "complete"?

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1 Q. You --

2 Should we get a dictionary?

3 A. No, I don't think I need a dictionary to
4 understand the word "complete." I just don't -- I
5 don't understand how you're using it because I've
6 told you everything that we had was reviewed, and
7 we've produced what we had, documents sufficient to
8 show. I've also told you that the format of those
9 documents changed over time.

10 Q. I'm satisfied that the jury will understand what
11 I'm asking you.

12 MR. NUNLEY: Good. Let's move on to
13 another question then.

14 Q. And I'm satisfied, Ms. Purcell, that the jury
15 will understand what it is you're trying to avoid
16 answering.

17 MR. NUNLEY: Objection, move to strike --

18 Q. The question --

19 MR. NUNLEY: Excuse me. Objection, move to
20 strike the colloquy of counsel.

21 Q. The question I am asking you is: Is the
22 information in the possession of Philip Morris
23 complete and sufficient to demonstrate each and every
24 chemical that was used in each and every flavor-house
25 ingredient used in cigarettes sold to Minnesotans?

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1 MR. NUNLEY: Same series of objections,
2 exceeds the scope of the 32 -- 30.02(f).

3 A. I'm sorry, I'm not an expert on ingredients and
4 chemicals, Mr. Gordon, but I know that we did a
5 thorough review and a complete production of
6 everything that we had that would respond to your
7 requests.

8 Q. And whether what you had is sufficient to show
9 each and every chemical, you just don't know; right?

10 MR. NUNLEY: Objection. Again you're
11 asking a -- this witness a question outside her
12 30.02(f) obligations. You can answer.

13 A. I don't know, Mr. Gordon.

14 Q. Okay. From time to time Philip Morris has
15 changed its formulas for its cigarettes; correct?

16 A. I believe so, yes.

17 Q. And when it changes a formula, it does so for a
18 specific reason; correct?

19 MR. NUNLEY: Now, Mr. -- Mr. Gordon, this
20 is clearly outside collection and production of a
21 30.0 -- 30.02(f) notice about collection and
22 production of Category II documents. You're asking
23 this witness now questions about its formula and
24 ingredient process.

25 Q. Do you remember the question?

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1 A. No, I'm sorry, I don't.

2 Q. When Philip Morris changes a formula, it does so
3 for a specific reason; right?

4 A. I don't know why it changes formulas. I don't
5 know all the reasons it might change formulas.

6 Q. Is it your understanding that formulas might
7 change just out of serendipity?

8 MR. NUNLEY: Objection, outside the
9 witness's area of responsibility as a 30.02(f)
10 deponent.

11 A. I don't normally speculate on why it is the
12 company changes formulas.

13 Q. Did Philip Morris do anything to search for
14 documents that would discuss or describe the reasons
15 or rationale behind any formula changes?

16 A. If those documents were generally within scope,
17 they were searched for and identified.

18 Q. Were they produced?

19 A. If they were responsive, they were produced.

20 Q. Is it your --

21 Well were any produced?

22 MR. NUNLEY: Were any what --

23 Q. Were any determined to be responsive and
24 produced?

25 MR. NUNLEY: Well, Mr. Gordon, are you

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1 suggesting that documents you just described are
2 responsive to numbers one and two of your
3 December 16th, '94 -- or excuse me, December 16th,
4 '96?

5 MR. GORDON: No, and to the extent I may
6 have been -- you may have been focusing on that,
7 I -- I -- I want to clear up the confusion.

8 Q. I'm talking about documents -- all the documents
9 requests that plaintiffs have served in this case,
10 including those that relate to design changes and
11 specifications relating to such things as nicotine
12 and -- and -- and tar and the nicotine-to-tar ratio
13 and things like that.

14 My question is: In collecting documents related
15 to formulas, were -- did Philip Morris search for and
16 produce documents related to the rationale for any
17 formula changes?

18 MR. NUNLEY: Objection as to form, asked
19 and answered.

20 A. I'm sorry, Mr. Gordon, it's been a long case and
21 there were a whole lot of separate requests
22 involved. I can't tell you specifically what
23 documents were produced to respond to which
24 requests.

25 Q. Well, it's my understanding that Philip Morris

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1 believes its formula information to be trade secret.
2 Correct?
3 A. I think that's accurate, yes.
4 Q. So if there was a document describing an
5 existing formula and a -- and a reason to change it
6 to a different formula, that could potentially
7 disclose competitive trade-secret information;
8 correct?
9 A. I believe it could.
10 Q. And that would be considered Category II
11 information where if it were responsive to any
12 request; correct?
13 A. That sounds accurate.
14 Q. And my -- my question is: In collecting --
15 In collecting and producing Category II
16 information, did Philip Morris search for documents
17 that did what I just described; in other words,
18 discuss existing formulas and reasons for changing
19 them to a different formula?
20 A. I believe we would have identified any documents
21 that discussed formulas. I don't know if they were
22 particularly responsive to your requests, but if they
23 were responsive, they were produced.
24 Q. Were any produced as Category II documents?
25 A. I don't know.

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1 Q. So in conducting your research to speak -- to
2 speak as the person most knowledgeable on behalf of
3 Philip Morris as to not only Philip Morris's
4 collection of Category II documents but also its
5 production of Category II documents, you did not
6 determine whether Philip Morris produced any
7 documents that described formula changes; is that
8 correct?

9 MR. NUNLEY: Objection as to form.

10 A. I know only that we produced documents
11 responsive to your requests, Mr. Gordon. I don't
12 interpret what types of documents fall within that
13 category of production.

14 Q. Did Philip Morris --

15 Has Philip Morris ever purchased reconstituted
16 tobacco from a third-party vendor?

17 A. I don't know.

18 Q. Did you do anything to determine whether Philip
19 Morris searched for or produced any documents related
20 to formula for reconstituted tobacco purchased from
21 third-party vendors?

22 A. I personally did not raise that question with
23 anyone that I spoke to.

24 Q. Okay. And so you wouldn't know whether Philip
25 Morris did or did not?

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1 A. Well if the topic -- if there were records
2 available in the areas within Philip Morris when we
3 were doing our search, we would have identified them;
4 and if they were within scope or relevant, we would
5 have collected them; and if they were responsive, we
6 would have produced them.

7 MR. GORDON: Okay. At this point I want to
8 ask a couple of specific questions about some
9 Category II documents, and pursuant to agreement, I
10 think we have to take a break to let the court
11 reporter change and exclude people from the room that
12 need to be excluded.

13 MR. NUNLEY: Well this --

14 MR. GORDON: It shouldn't -- it shouldn't
15 be more than about five, ten minutes of questions.

16 MR. NUNLEY: Does this signal a change?
17 You told me at the beginning of this deposition you
18 did not intend to do Category II documents.

19 MR. GORDON: No, I didn't. I told you I
20 thought --

21 MR. NUNLEY: You told me with Houghton you
22 would, with this witness you would not.

23 MR. GORDON: No, I said I expected to use
24 one or two documents with this witness very briefly
25 at the end.

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1 MR. NUNLEY: All right. I don't think we
2 need to go off the record. Let's just -- people who
3 are not supposed to be in here for Cat II, which I
4 think includes Washington, and I would ask that the
5 Lorillard attorney leave also. We can just finish
6 because we are on a tight schedule.

7 MR. GORDON: Well before we go, first of
8 all, it's my -- my understanding that the attorneys
9 don't have to leave for Category II documents, but --

10 MR. NUNLEY: Well, is this a fight you want
11 to pick with me as to the Lorillard attorney?

12 MR. GORDON: No, I just -- I just wanted --
13 well Lorillard is represented by Shook, Hardy &
14 Bacon. I just note the irony of you asking to
15 exclude them from knowledge about Philip Morris's
16 formulas, but --

17 MR. ROSTON: Just for the record, I'm from
18 Doherty Rumble & Butler, not Shook Hardy.

19 MR. GORDON: Right, but --

20 MR. NUNLEY: Excuse us. You might make an
21 effort to learn your colleagues before the
22 deposition.

23 MR. GORDON: Okay. But the point is we
24 need -- my understanding is we need to give the court
25 reporter an opportunity to change tapes so that there

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1 is a separate Category II tape and transcript.

2 MR. NUNLEY: Fine.

3 THE REPORTER: Off the record, please.

4 (Discussion off the stenographic record.)

5 (Category II deposition commenced and will

6 be bound under separate cover labeled

7 "Volume I-A.")

8 (Recess taken.)

9 (Witness sworn.)

10 MR. NUNLEY: Mr. Gordon, as I mentioned

11 before we went on the record, I had something I

12 wanted to say.

13 In your questioning of Ms. Purcell, you asked

14 her -- I don't have a line reference -- some question

15 or a question concerning leaf blend information, and

16 I think you asked her whether that -- those documents

17 had been produced and I told you at the time that

18 there was a letter on that and I wanted to remind you

19 and also to put on the record that I think that

20 involves the 900-and-some-thousand pages, if that's

21 the accurate number -- and I may be misremembering --

22 of leaf blend information that was made available to

23 you in exemplar form and that you looked at and --

24 and indicated to us that you were not interested in

25 having it produced.

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1 KENNETH S. HOUGHTON

2 called as a witness, being first duly
3 sworn, was examined and testified
4 as follows:

5 ADVERSE EXAMINATION

6 BY MR. GORDON:

7 Q. Could you state your full name for the record,
8 please.

9 A. My name is Kenneth S. Houghton.

10 Q. And you're --

11 You have a Ph.D.; is that correct?

12 A. Yes, sir.

13 Q. Dr. Houghton, it's my understanding you are
14 recently retired from Philip Morris.

15 A. Yes, sir.

16 Q. When did you retire?

17 A. October 1st, 1996.

18 Q. What was your position at the time of your
19 retirement?

20 A. My title was senior vice president, research and
21 development.

22 Q. How long had you held that title?

23 A. I'd held the title of senior vice president for
24 about I think maybe four years or so. Prior to that,
25 my title was vice president of research and

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1 development.

2 Q. And how long had you held that title?

3 A. Since January 1st, 1986.

4 Q. So about six years?

5 A. I believe that's correct, yeah.

6 Q. How long had you been employed in total with

7 Philip Morris?

8 A. I think I joined Philip Morris August 15th,

9 1970, so that would have been about 26 years in
10 total.

11 Q. What was your first position with Philip

12 Morris?

13 A. I think it was technical director for the

14 Lightfoot Company, a division of Philip Morris

15 Consumer Products.

16 Q. When did you switch over to cigarettes?

17 A. January '74 I transferred from Hoboken to

18 Richmond as part of the start-up team for the

19 blend -- the refined leaf plant.

20 Q. Is that the Park 500 plant?

21 A. Yes, that's what it's called today.

22 Q. So from 1974 to 1996, you were involved in

23 Philip Morris cigarette research and development; is

24 that correct?

25 A. No. I was in manufacturing from '74 through

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1 1983. In April of '83 I transferred to Europe as the
2 director of R&D for Europe, Middle East and Africa,
3 and that was when I basically started doing work in a
4 research/development technical services area.

5 Q. You returned to the U.S. in '86?

6 A. Correct.

7 Q. What's your Ph.D. in?

8 A. Organic chemistry.

9 Q. Prior to your work at Philip Morris, had you
10 done any work in the cigarette industry?

11 A. No.

12 Q. So your cigarette work is confined basically
13 from 1974 to 1980 -- 1996; correct?

14 A. Correct.

15 Q. You're not currently working in the cigarette
16 industry?

17 A. I presently have a -- an agreement where -- with
18 Philip Morris where I'm receiving a partial salary,
19 but I am not actively working in the industry.

20 Q. Are you doing consulting work with Philip
21 Morris?

22 A. If -- as part of the agreement, if they ask me
23 to do something, I'll do it, but it's not that I get
24 paid a consulting fee for doing it as such.

25 Q. It's my understanding that you are here today to

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1 speak on behalf of Philip Morris with respect to
2 cigarette design and manufacturing. Is that
3 correct?

4 A. That's correct.

5 Q. But it's also my understanding that you're not
6 the spokesman for Philip Morris with respect -- with
7 respect to nicotine control and other reinforcing
8 substances; is that right?

9 MR. NUNLEY: Let --

10 MR. GORDON: I'll -- that's fine.

11 MR. NUNLEY: Okay.

12 MR. GORDON: I'll -- I'll take Mr. Nunley.

13 MR. NUNLEY: What Dr. Houghton is prepared
14 to testify on is the control of nicotine and other
15 reinforcing substances in the manufacture of
16 cigarettes, the design and manufacture of cigarettes
17 concerning the same. Now as I told you, I anticipate
18 you may have some questions about nicotine
19 manipulation via chemical compounds, and that
20 portion, to the extent that's included in number
21 five, Dr. Ellis is prepared to testify about.

22 Q. Okay. I -- I'm a little confused as to the
23 clear lines of demarcation and -- and -- and maybe
24 you are, too, and if we hit an area where you're not
25 prepared to testify as the person most -- most

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- 1 knowledgeable at Philip Morris, you'll let me know.
- 2 A. Okay.
- 3 Q. Okay?
- 4 A. Thanks.
- 5 Q. And your successor was -- is -- is Dr. Cathy
- 6 Ellis; right?
- 7 A. That is correct.
- 8 Q. And she's going to be testifying later this week
- 9 on whatever issues you're not going to testify on?
- 10 A. I -- I believe so.
- 11 Q. Okay. In --
- 12 In the design and -- and manufacture of
- 13 cigarettes, it is possible to control the level of
- 14 nicotine, is it not?
- 15 A. It is possible to control the level of nicotine,
- 16 and we did so in products such as the denic where we
- 17 actually controlled how much nicotine remained in the
- 18 tobacco after the extraction. In general, what we do
- 19 is we control for the tar delivery of the cigarette.
- 20 The denic was an exception.
- 21 Q. Okay. And in the case of the denic, you were
- 22 able to extract virtually all of the nicotine; is
- 23 that correct?
- 24 A. The -- the specification called for removal of
- 25 97 percent of the nicotine, and in reality we -- on

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1 occasions we may have been able to get as much as 98
2 percent out, but we were never able to get a hundred
3 percent out.

4 Q. And the denic cigarette was actually marketed
5 for a period of time; correct?

6 A. It was marketed in several different
7 configurations, anywhere from 4 to 11 milligram,
8 regular, menthol, king size, hundreds, under
9 different trademarks in different marketplaces, and I
10 think that that took over three years, the different
11 trademark tests that we had.

12 Q. Okay. And in all those various configurations,
13 the menthol and the -- the different lengths and --
14 that you've just described, the level of
15 denicotinization would have been approximately 97, 98
16 percent; correct?

17 A. Correct. That's how -- that's how much was
18 removed from the tobacco.

19 Q. Okay. And none of those products were
20 commercially successful; correct?

21 A. Well, they were not commercially successful --

22 MR. NUNLEY: Let -- let me just --

23 THE WITNESS: Yeah.

24 MR. NUNLEY: Corey, I'm not going to stop
25 him on this question, but I think it's outside the

1 30.02(f) designation of number five. Even as we've
2 carved it up, I don't think it's included at all
3 within number five, but he can answer, but my
4 objection is he's not answering this question on
5 behalf of Philip Morris. He is answering it in a
6 personal capacity.

7 A. Okay?

8 Q. Were you done with your answer?

9 A. No.

10 Q. Okay. Go back to it, --

11 A. I mean --

12 Q. -- please.

13 A. -- basically the cigarette went into different
14 test markets, and depending upon the marketing
15 program and -- and the product, et cetera, and the
16 marketplace, it -- it may have been able to capture a
17 couple of two-, three-, four-tenths depending upon
18 the amount of time it was in the test market. In
19 order to -- to launch that kind of a product on a
20 national basis, the costs of doing that kind of
21 launching, a decision was made that it was not
22 successful enough to really justify that kind of
23 expense.

24 Q. All of the commercial cigarettes sold by Philip
25 Morris other than those test-market denicotinized

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1 cigarettes that you just talked about then contained
2 nicotine; correct?

3 A. Yes.

4 Q. Okay.

5 A. Uh-huh.

6 Q. And you mentioned, I believe, something called
7 tar; correct?

8 A. Yes.

9 Q. Okay. It's possible to adjust the ratio of
10 nicotine to tar in a cigarette; correct?

11 MR. NUNLEY: Objection as to form.

12 A. Is it possible to do that? Yes, it would be
13 technically possible to do it.

14 Q. What are the ways that it can be done
15 technically?

16 A. One of the things you could do is -- is
17 denicotinize the tobacco. This would significantly
18 change the -- the ratio of tar to nicotine in the
19 smoke. Theoretically if you wanted to, you could buy
20 nicotine and add it.

21 Outside of that, to make radical changes, I
22 don't know how you would make radical changes in a
23 tar-to-nicotine ratio. You could have some effect,
24 possibly up to 10 or 15 percent effect, in the
25 overall delivery of tar or nicotine based upon blend

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1 selection.

2 If you increase the -- significantly increase
3 the -- the amount of recon in a blend, you might
4 reduce by some 10 percent or so in a ballpark the
5 nicotine delivered by that cigarette.

6 Q. Could you explain to the jury what you mean by
7 "recon."

8 A. Reconstituted tobacco is a type of tobacco
9 material that is made from pieces of the tobacco
10 plant purchased by -- by the tobacco companies that
11 is not necessarily in a form that makes it readily
12 usable in the manufacturing of cigarettes, so
13 processes have been developed which take these
14 unusable pieces of material such as stem, which is
15 the hard part of the tobacco leaf, the mid-part of
16 the leaf, small pieces of lamina that break off, dust
17 that's generated during processing, et cetera, and
18 all of these materials can be converted using
19 different processes into a form similar to a sheet of
20 paper, say, that could then be utilized in that
21 physical form to be blended back in with other
22 tobaccos to make cigarette filler.

23 Q. And in the reconstitution process, you extract
24 all of the nicotine from the -- this filler material
25 during processing and then put some of it back in;

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1 correct?

2 MR. NUNLEY: Well objection. I think we
3 need to be specific as to which reconstitution
4 process we're talking about.

5 A. That's not exactly correct, what you're saying
6 there. And -- and Mr. Nunley has a point. There are
7 different processes. There are different processes
8 Philip Morris uses. There are different processes
9 that -- that can be used by other companies.

10 So you -- in talking about a process, I think
11 you have to -- you have to know exactly which one you
12 want to talk about, and I'm not sure.

13 Q. Let's talk --

14 Tell me the different processes that Philip
15 Morris uses and has used.

16 A. And has used. If you go back to the '50s,
17 Philip Morris used a process that I believe was
18 originally developed by AMF; American Machinery and
19 Foundry I think was the name of the company. And it
20 was what is referred to as a sandwich sheet. And
21 there you -- you had one layer of fine tobacco
22 material. On top of that layer of fine tobacco
23 material was placed a second layer of a binding or
24 adhesive material. Then on top of that was a third
25 layer of tobacco, and then you -- you tried to make a

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1 sheet by binding the two layers of tobacco with this
2 binding agent. So that was one process that was used
3 back in the '50s, maybe early '60s, the AMF process.

4 Then as time went on, the -- Philip Morris
5 improved upon that process through the use of a
6 different type of binding agent to hold the layers
7 together, and that process is referred to as BL,
8 which I -- I believe meant blended leaf at the -- at
9 that time. Then in the late '60s a further
10 refinement of that kind of process was developed by
11 Philip Morris, and that -- that's a process that
12 instead of taking an external adhesive material, it
13 utilized the naturally occurring pectin that's in the
14 tobacco and through a processing methodology
15 solubilized that pectin, and it was used to hold the
16 little pieces together, the little pieces of tobacco
17 dust, and a sheet made out of that. That's the RCB
18 process, as it's referred to today.

19 Q. What does "RCB" stand for?

20 A. I think -- I think it's "reconstituted cigarette
21 blend" is what the -- the letters refer to as I --
22 was explained to me some time ago.

23 Now, in the '70s Philip Morris started to use a
24 second process for -- for making reconstituted
25 tobacco, and that process is often described as the

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1 Schweitzer process. And what it does is it uses
2 papermaking technology, which produces the sheet
3 using physical -- physical properties of the fiber to
4 form a sheet instead of using chemical properties
5 of -- of an adhesive like pectin to hold the pieces
6 together.

7 Q. Is that called RL?

8 A. That -- that is referred to as RL, yes, sir.

9 Q. Is the BL or the RCB known as a band cast
10 process?

11 MR. NUNLEY: Objection. Known by whom?

12 MR. GORDON: Anybody.

13 A. I --

14 MR. NUNLEY: Objection, foundation.

15 A. I have never heard it used, that term used,
16 to -- to refer to BL. I've heard people call it a
17 cast leaf kind of process, but I've never heard band
18 leaf. Is that what you --

19 Q. Band cast.

20 A. Band cast. I've never heard that term used to
21 describe it.

22 Q. Okay. We were talking about the different ways
23 one could alter the nicotine-to-tar ratio, and we
24 stopped when you talked -- when you mentioned using
25 the amount of recon to clarify what recon is. Were

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1 you done or are -- or are there any other ways
2 that -- that can be used to alter the nicotine-to-tar
3 ratio?
4 A. I -- I think I might have to ask to go back to
5 what --
6 Q. Sure.
7 A. -- what I was saying at that time. Okay?
8 Q. Well according -- according to my notes --
9 and -- and certainly correct me if I'm wrong, but one
10 way was to denicotinize tobacco. Another way would
11 be to add nicotine to tobacco. A third way would be
12 through blend selection, and a fourth way would be
13 the amount of recon.
14 A. Well, what I said is through blending, you might
15 be able to affect the ratio some smaller amount,
16 maybe 10, 15 percent, just off the top of my head,
17 and one of the ways you could do that is if you put a
18 lot of recon in, into the blend, which is part of
19 those blend thing, but it wasn't separate. It was an
20 example of putting a lot of recon into the blend
21 instead of, say, a flue-cured tobacco strip or a
22 burley tobacco strip. Then you would be putting in a
23 material that's extremely low in nicotine content as
24 compared to, say, U.S. flue-cured or U.S. burley
25 tobaccos grown here.

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1 Q. Okay.

2 A. So from that point of view, you might be able
3 to -- to affect the -- the nicotine level somewhat
4 while holding the tar level constant. You might be
5 able to do that.

6 Q. Are there other ways to affect the nicotine/tar
7 ratio?

8 A. There -- there may have been. I -- people may
9 have researched other things, but off the top of my
10 head, I'm -- I'm not coming up with any -- any new
11 ideas.

12 Q. Okay. Let me ask you then about some
13 specifics.

14 Can changing the physical characteristics of the
15 cigarette affect in any way the nicotine/tar ratio?
16 By that I mean things like the length, the
17 circumference, ventilation, density of packing of the
18 material. Any of those kind of physical
19 characteristics have any impact on nicotine- --

20 MR. NUNLEY: Let me --

21 Q. -- to-tar ratio?

22 MR. NUNLEY: Let me ask one question,
23 Mr. Gordon. Are you intending to limit, for example,
24 that question to commercial parameters or are you
25 saying without respect to any commercial parameters

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1 is it theoretically possible?

2 MR. GORDON: At this point as is it
3 theoretically possible.

4 MR. NUNLEY: Well I -- okay.

5 A. Ask the question again now, not just
6 theoretically possible. I got lost, I'm sorry.

7 Q. Are there any physical characteristics of a
8 cigarette that can be modified in such a way as to
9 affect the nicotine-to-tar ratio?

10 A. You can have some effect on nicotine -- on
11 tar-to-nicotine ratio, okay, which is the way I think
12 about it anyhow.

13 Q. Okay.

14 A. On the tar-to-nicotine ratio through the
15 construction of the cigarette. For instance, a
16 Marlboro Red has a 14-and-a-half, 15 tar-to-nicotine
17 ratio. Using the same tobacco, you make Marlboro
18 Lights. That ratio is now 12 and a half to 1 if you
19 just divide it. You have not changed the -- the
20 tobacco. You've not changed -- not changed cigarette
21 paper, et cetera, the flavors, but what you have done
22 is you've changed the filter significantly. You've
23 lengthened the filter. You made the filter more
24 efficient, but more than anything else, you've more
25 than doubled the amount of ventilation used in -- in

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1 taking that cigarette from 16 milligrams down to 11.

2 So based upon that, it is apparent as -- as you
3 change the filtration and especially with that
4 increase in ventilation associated with bringing the
5 tar delivery down, it does have an effect on the
6 tar-to-nicotine ratio.

7 Q. So simply by changing the physical
8 characteristics; in this case, the filter and
9 ventilation, you can take the same tobacco in
10 Marlboro Reds and turn it into a Marlboro Light?

11 MR. NUNLEY: Well objection as to form.

12 Q. Is that correct?

13 A. Yeah, I -- it's -- it may seem simple when you
14 buy them. When you make them, it's not -- it's not
15 really that simple, the -- the manufacturing, the
16 filter and all and the ventilation, but basically the
17 filtration and the ventilation will change the
18 tar-to-nicotine ratio somewhat in going from a full
19 flavor down to a light.

20 Q. So the Marlboro Lights because of the physical
21 design choices that Philip Morris makes has a higher
22 nicotine-to-tar ratio than Marlboro Reds; right?

23 A. It has a -- it has a tar-to-nicotine ratio of 12
24 versus 15. It's reduced the tar, reduced the
25 nicotine, but apparently reduced the tar at a

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1 faster -- somewhat faster rate.

2 Q. So the design choices that Philip Morris makes
3 in making the Marlboro Light effectively increase the
4 nicotine-to-tar ratio of a Marlboro Light over a
5 Marlboro Red; correct?

6 MR. NUNLEY: Objection. I think it
7 misstates his testimony.

8 THE WITNESS: Excuse me?

9 MR. GORDON: Do you want that back again?

10 THE WITNESS: No. I didn't hear what he
11 said.

12 MR. NUNLEY: I'm just making an objection
13 for the record.

14 THE WITNESS: Oh.

15 MR. GORDON: He does that from time to
16 time.

17 A. It effectively reduced the tar down to where we
18 want it, where we wanted that cigarette to be, and it
19 has a nicotine value of .9 milligrams of smoke
20 nicotine, and that's where it came out.

21 Q. And in reducing that tar, you reduced the --

22 A. We reduced the nicotine, the tar proportionately
23 somewhat more than the nicotine.

24 Q. Okay. And that results in a higher
25 nicotine-to-tar ratio; correct?

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1 A. I don't know. I don't know what the -- what the
2 number would be.

3 Yes.

4 Q. Okay.

5 A. Yes.

6 Q. And if Philip Morris had wanted to maintain the
7 same tar-to-nicotine ratio in Marlboro Lights as
8 exists in Marlboro Reds, it would be possible to
9 reduce the tar by the filtration and -- and
10 ventilation that you talk about and through blend
11 changes reduce the nicotine; correct?

12 MR. NUNLEY: Objection, assumes facts not
13 in evidence.

14 A. Well, theoretically you might be able to bring
15 the nicotine down a little more. If you wanted to
16 bring the nicotine down a little more, what you'd do
17 is you'd just put more ventilation and better
18 filtration and then you make Marlboro Ultralight or
19 something like that.

20 Now, without -- just theoretically, it might be
21 possible by putting in more recon to bring it down
22 another 10 percent of what that was, whatever it is,
23 theoretically, yeah.

24 Q. You actually jumped ahead, and I appreciate you
25 doing that. The -- it --

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1 You could reduce the nicotine in a Marlboro
2 Light even further with different ventilation and
3 different filtration; correct?

4 A. Yeah, and in fact we have a Marlboro Ultralight
5 product that's in test market which is like 6
6 milligrams of tar.

7 Q. But in terms of the design choices that Philip
8 Morris makes, it has made the choice in manufacturing
9 the Marlboro Lights to alter the tar and nicotine
10 ratio by lowering the tar more than it lowers the
11 nicotine; correct?

12 A. No. We made a decision to lower the tar down to
13 11 milligrams in order to have a Marlboro Light. The
14 reality is we reduced the nicotine also, but not
15 quite as much as the tar --

16 Q. Okay. And --

17 A. -- proportionally.

18 Q. And Marlboro made the design choice not to do
19 the things it could have done to have reduced the
20 nicotine a little bit further and -- and maintain the
21 same nicotine-to-tar ratio as in Marlboro Reds;
22 correct?

23 MR. NUNLEY: Objection. Mr. Gordon, you
24 might want to read that question back.

25 Q. Do you want me to read the question back?

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1 A. Please.

2 MR. NUNLEY: Do you see "and Marlboro made
3 the design choice"?

4 MR. GORDON: Oh, okay.

5 Q. And Philip Morris made the design choice not to
6 do the things it could have done to have reduced the
7 nicotine a little bit further and maintain the same
8 nicotine-to-tar ratio as in Marlboro Reds; correct?

9 A. No. No, that's not correct. What Philip Morris
10 decided to do is to provide the consumers with a
11 Marlboro Lights at 11 milligram. It has today I
12 think 0.9 milligrams of smoke nicotine under FTC
13 conditions. The decision was to provide the
14 consumers with what they wanted, a lower-tar-delivery
15 option to Marlboro Red. That's what was provided.

16 Later on we made a decision to try to develop an
17 even lower Marlboro tar product, which we referred to
18 as Marlboro Ultralights.

19 Q. Okay. Right now I want to focus on the design
20 choices that Philip Morris made in coming out with
21 the Marlboro Lights. Philip Morris made the choice
22 to reduce the tar in the manner it did; correct?

23 A. Correct.

24 Q. And in so doing, Philip Morris knew that the
25 result would be that the nicotine-to-tar ratio would

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1 be different in the Marlboro Light than in the
2 Marlboro Red; correct?

3 MR. NUNLEY: Object -- excuse me.

4 Objection, assumes facts not in evidence.

5 A. I -- not having personally made that decision at
6 the time, I -- I tell you I don't believe the
7 decision was made to change the nicotine-to-tar
8 ratio. First of all, we talk about tar-to-nicotine
9 ratio. We -- we make a decision to develop the
10 product at 11 milligrams of tar. It came out at .9.
11 It might have come out at .8, but it didn't. It came
12 out at .9.

13 Q. Okay. I --

14 A. That's -- that's the decision that was made.

15 Q. Right. And I think you may be assuming more in
16 my question than is actually there. My question is:
17 When Philip Morris made the design choice to reduce
18 the -- the -- the tar in the manner it did in the
19 Marlboro Lights, it was aware that the manner in
20 which it chose to reduce the tar would result in a
21 different nicotine-to-tar ratio? Whether it wanted
22 it or not, it knew that that would happen?

23 MR. NUNLEY: Objection.

24 Q. That's my question.

25 MR. NUNLEY: Excuse me. Objection,

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1 foundation, assumes facts not in evidence.

2 A. I don't think that was part of the decision
3 making.

4 Q. I understand that -- that that's your testimony,
5 that that wasn't a part of the decision making. My
6 question and -- to you as the -- as the person most
7 knowledgeable about Philip Morris's design choices in
8 its cigarettes is: When Philip Morris made the
9 design choice to reduce the tar in the manner it
10 chose to reduce the tar, by ventilation and -- and
11 filtration, from Marlboro Red to Marlboro Light, it
12 was aware of the fact that the manner it chose to
13 effectuate that change --

14 A. Uh-huh.

15 Q. -- resulted in a different nicotine-to-tar
16 ratio; --

17 MR. NUNLEY: Objection.

18 Q. -- correct?

19 MR. NUNLEY: Objection. On that specific
20 point, lack of foundation.

21 A. And my position is they would have known a --
22 that it would have a different tar-to-nicotine
23 ratio.

24 Q. Okay.

25 A. Okay, yes.

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1 Q. And -- and I -- your counsel objected on lack of
2 foundation. Are -- you -- do you not know?

3 A. That was 1967. I didn't make that decision for
4 that product at that time.

5 Q. And you understand you're being produced here
6 today as the spokesperson for Philip Morris?

7 A. Correct.

8 Q. And you understand your -- your obligation is to
9 testify as the person most knowledgeable about the --
10 those design choices, whether you yourself were
11 personally involved in them or not; correct?

12 A. Correct.

13 Q. Okay. And I --

14 I take it you did something to prepare yourself
15 for today's deposition.

16 A. Yes, sir.

17 Q. Okay. So your --

18 Are you satisfied that you -- when you give this
19 testimony, you understand even if you didn't have
20 personal involvement in --

21 A. Yes, sir.

22 Q. -- in this particular --

23 MR. NUNLEY: But, Mr. Gordon, you've asked
24 him a very fine subset of number five, particularly
25 going to what was in Philip Morris's mind as he's now

1 testified in 1967, and you've not made -- laid any
2 foundation for his knowledge at that point.

3 MR. GORDON: Well this is a 30.02(f)
4 witness, Mr. Nunley. I don't believe I am obligated
5 to lay the foundation for what he's obligated to --
6 to have.

7 MR. NUNLEY: I disagree with you,
8 Mr. Gordon. I think our obligation is to produce the
9 person most knowledgeable. We've produced a witness
10 to cover a considerable amount of time. I think you
11 can pick out any specific areas during that
12 considerable amount of time that perhaps no single
13 witness can answer.

14 MR. GORDON: Yeah.

15 THE REPORTER: Off the record, please, to
16 change tape.

17 (Discussion off the record.)

18 BY MR. GORDON:

19 Q. Okay. And when Philip Morris made its initial
20 design choices with respect to the Marlboro Lights,
21 it could have instituted design changes that would
22 have maintained the same tar-to-nicotine ratio as in
23 Marlboro Reds; correct?

24 MR. NUNLEY: Objection.

25 A. I think that's theoretically correct.

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1 Q. Is there any practical reason why it couldn't
2 have been done?

3 A. Well for instance, we did not at that time, I
4 believe, have -- have the RL plan, that kind of -- of
5 thing.

6 Q. Okay. I thought, if I understood your earlier
7 testimony, that one of the ways that the nicotine
8 could have been lowered would be to modify the
9 ventilation.

10 A. I didn't -- I didn't say that.

11 Q. So modifying ventilation --

12 A. I didn't say that.

13 Q. -- wouldn't affect the nicotine -- the amount of
14 nicotine?

15 A. If you increase ventilation, you'll reduce
16 across the board tar and nicotine.

17 Q. Okay.

18 A. But I did not say that ventilation was a means
19 of -- of independently adjusting nicotine.

20 Q. Okay. Has Philip Morris ever changed the
21 nicotine-to-tar ratio difference between Lights and
22 Reds?

23 MR. NUNLEY: Objection as to form.

24 A. I'm -- I'm sorry, I'm not really sure what the
25 question -- what you're asking me on that.

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1 Q. Okay. Let me -- let me see if I can ask it a
2 different way.

3 You were talking earlier about -- about the
4 initial design choices made in 1967 when Philip
5 Morris first came out with Marlboro Lights. Okay?
6 A. Uh-huh.

7 Q. And you -- you were trying to explain the
8 difference between what was theoretically possible
9 and what was practically possible back in 1967. At
10 some point in time, there's no question that it
11 became practically possible to modify the
12 nicotine/tar ratio of the Marlboro Light in order to
13 keep it the same as Marlboro Red; correct?

14 MR. NUNLEY: Ob -- objection as to form.
15 Move to strike counsel's statement at the beginning
16 of the question.

17 Q. Do you recall the question?

18 A. Your question was there -- there were -- was
19 some time then after where it might be possible for
20 Philip Morris to -- to have gone in and made an
21 adjustment in blend -- is that what you're asking
22 me? -- to change the nicotine delivery?

23 Q. Right.

24 A. And theoretically that's possible, but to make
25 an adjustment large enough to -- to -- and I -- I'm

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1 trying to guess. I guess you'd have to get down 25
2 percent lower, without doing the mathematics, would
3 require so much recon, say, to replace the bright
4 burley strip in there that you may have a cigarette
5 that you could force in that direction. The problem
6 with it is you wouldn't want to put Marlboro's name
7 on it because it would no longer taste and smoke like
8 a Marlboro.

9 Q. Okay. Another way of adjusting the
10 nicotine-to-tar ratio is by the addition of chemicals
11 to the cigarettes; correct?

12 A. I said if you added nicotine to the cigarette,
13 you could adjust the tar-to-nicotine ratio.

14 Q. How about if you add acid to the filter?

15 A. What I recall is that that would not have an
16 impact on a tar-to-nicotine ratio. Acids could
17 affect the total delivery, but I would not see that
18 as having reasonably a -- a independent effect on
19 nicotine.

20 MR. GORDON: Okay. Can I have the court
21 reporter mark this, please.

22 (Plaintiffs' Exhibit 1303 was marked
23 for identification.)

24 THE WITNESS: Oh, okay.

25 BY MR. GORDON:

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1 Q. Dr. Houghton, I'm showing you what's been marked
2 as Plaintiffs' Exhibit 1303, a document produced by
3 Philip Morris bearing Bates stamp number 2023957309
4 through 7323, a Philip Morris USA interoffice
5 correspondence dated January 23, 1990 from Gus
6 Keritsis to Tim Callaham.

7 A. Uh-huh.

8 Q. And the subject is entitled "Nicotine Reduction
9 in Cigarette Smoke with Acidic Filter Additives."
10 I'll give you a moment to look at the document.

11 MR. NUNLEY: Mr. Gordon, can you -- can you
12 direct me where on the -- for the predesignation of
13 this document?

14 MR. GORDON: I don't have the
15 predesignation in front of me.

16 MR. NUNLEY: Well I don't -- I'm looking at
17 this one. I don't find it.

18 MR. GORDON: It may have been on the --

19 MR. NUNLEY: Well I'd like you to find it.
20 I'd just like -- because I don't see it on the
21 predesignation. I'm not saying it's not on there.
22 I'm just telling you the one I can put my hand on, I
23 don't see it.

24 MR. GORDON: Chip, I don't know where it
25 is, but I'm reasonably confident it was on the

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1 predesignation list.

2 MR. NUNLEY: Well then I'd ask you, if you
3 can't show me, let's put this one aside. I'll look
4 for it. If I find it, you can certainly ask this
5 question of this witness about it.

6 MR. GORDON: No, I'll -- I'm going to keep
7 going with this question with the witness.

8 MR. NUNLEY: No. Mr. Gordon, I'm just -- I
9 want to make the record on this. I'm looking at your
10 September 15 designation, which appears to me to be
11 in Bates number order. This is 202395. I'm looking
12 at Philip Morris. I see 202395. This listing I have
13 goes from 2023861873 to 202400. Now that's -- that's
14 on that one. I'm looking now, and I'd ask you to
15 look, too. If you have it on another designation,
16 please tell me, but if it hasn't -- perhaps it's on
17 here.

18 It's predesignated, although I would note that
19 it's on a supplemental predesignation.

20 BY MR. GORDON:

21 Q. Is it giving you a chance to look at that at
22 least?

23 A. I'm -- I'm reading it. Is it okay?

24 Q. Sure, absolutely.

25 (Witness reviews Plaintiffs'

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1 Exhibit 1303.)

2 BY MR. GORDON:

3 Q. There are just a couple of things I actually
4 want to draw your attention to. You're certainly
5 free to read the -- the whole thing if you -- if you
6 want to, but the first thing I want to --

7 MR. NUNLEY: Let -- Mr. Gordon, let me just
8 say if this document -- I don't know what your
9 questions relate to, but if they relate to the use of
10 additives in cigarettes to increase nicotine in
11 smoke, that I think falls more appropriately in
12 Dr. Ellis's side of this designation.

13 MR. GORDON: Well let's see what this
14 witness is able to say.

15 MR. NUNLEY: Well, is that going to be your
16 test -- your questioning?

17 MR. GORDON: Chip, let me go on with the
18 questioning.

19 MR. NUNLEY: No.

20 MR. GORDON: You know, you're not entitled
21 to instruct the witness not to answer unless it's a
22 matter of privilege.

23 MR. NUNLEY: Well I -- excuse me. I think
24 on -- on this situation we are. If I tell you that
25 we have another 30.02(f) witness, which I think,

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1 Corey, I've already told you, who will address the
2 issue of the use of additives, to the use of
3 additives and whether the use of additives may have
4 any impact on the delivery of nicotine, Dr. Ellis
5 would address that. I told you that at the beginning
6 of today. I told you that when we talked by phone.
7 I don't --

8 MR. GORDON: I appreciate that. That's not
9 a basis for instructing the witness not to answer.

10 MR. NUNLEY: Are you interrupting me?

11 MR. GORDON: Yeah, I am, because I want to
12 get on with this deposition and I'm really getting
13 tired of your continual interruptions and your
14 continual speaking objections. If -- if -- if I ask
15 a question that invades privilege, you can instruct
16 him not to answer. If I don't, object, and let's get
17 on with the -- the deposition.

18 MR. NUNLEY: Corey, there's no reason to
19 raise your voice and knit your brow. I'm just trying
20 to tell you that we tried to give you on number five
21 two witnesses to cover it. I've told you going in
22 how that would be divided. Now I think it's improper
23 if you're going to try to basically cover with both
24 witnesses the same ground.

25 MR. GORDON: Your objection is noted.

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1 MR. NUNLEY: Well there's -- there's more
2 to it, and the more is I won't instruct this witness
3 not to answer, but I'm telling you now he's not
4 answering in a 30.02(f) capacity. You can ask
5 Dr. Ellis about the use of additives to increase
6 nicotine delivery.

7 MR. GORDON: Is the court getting real time
8 of this transcript?

9 THE REPORTER: No.

10 MR. GORDON: I -- I just want to put you on
11 notice, Mr. Nunley, if this kind of stuff continues,
12 we're going to call the court because this is
13 ridiculous. You are impeding my ability to examine
14 this witness, and it is a violation of the case
15 management order.

16 MR. NUNLEY: Corey, all I'm trying to do is
17 have the appropriate witness on this topic answer
18 your questions.

19 MR. GORDON: If you believe a question is
20 outside the scope of this witness's knowledge, you
21 have the right to object on grounds of foundation.
22 You have demonstrated a perfect ability to interpose
23 that objection. Please do so, and let me get on with
24 the questioning so we can finish today.

25 BY MR. GORDON:

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1 Q. Dr. Houghton, I direct your attention to page
2 five of this document, the cc list.

3 A. Yes.

4 Q. You were one of the recipients of this document,
5 were you not?

6 A. That's correct. That's what it says.

7 Q. Okay. Now direct your attention back to page
8 one, and what -- what is the first conclusion? Could
9 you read that for the record.

10 A. Yeah. I want to point out one thing. This is
11 GCC; that's Gulf Coast countries. This is -- this is
12 relative to an export cigarette, so just so I point
13 it out.

14 "The addition of acidic additives to CA-filters
15 reduces the nicotine-to-tar ratio, and certain other
16 basic/acidic substances in cigarette smoke."

17 Q. Okay. Is there anything unique about the -- the
18 Gulf Coast that makes -- that would make the addition
19 of acidic acids to CA-filters and their ability to
20 reduce the nicotine/tar ratio different than what
21 would happen to the same cigarettes in the United
22 States?

23 A. Yeah, it's --

24 MR. NUNLEY: So the record's clear, Gulf
25 Coast is not Gulf Coast of the United States, but

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1 it's Gulf Coast countries.

2 MR. GORDON: Right.

3 A. It's the Gulf Coast countries, you know, Saudi
4 Arabia, et cetera.

5 Q. Right. Is there something unique about Saudi
6 Arabia that if you put acids in the filter there it
7 reduces the nicotine-to-tar ratio, but if you put the
8 same acid in the same filter in a cigarette in
9 Minnesota, it doesn't?

10 MR. NUNLEY: Objection as to form.

11 A. I -- I couldn't answer that off the top of my
12 head, but there is a big difference between the
13 Marlboro marketed and sold in Saudi Arabia and the
14 U.S. markets, Marlboro sold in Minnesota, yes.

15 Q. Okay. But my question relates to the -- the
16 science. If a -- if an acidic additive to a filter
17 reduces the nicotine-to-tar ratio, does it matter if
18 the cigarette is sold in Saudi Arabia or in
19 St. Paul?

20 MR. NUNLEY: Objection, incomplete
21 hypothetical.

22 A. I'd have to take a look and see what it says in
23 here to answer your question. Is there a difference
24 between a longer filter and a shorter filter,
25 different kinds of ventilation, different levels of

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1 ventilation, that might affect the results between a
2 cigarette sold here and a cigarette constructed
3 differently sold someplace else? I -- I don't know
4 if it would have the same effect.

5 Q. No, my question is: If a cigarette is
6 constructed identically --

7 A. Oh, identically? No.

8 Q. Is there anything about Minnesota --

9 A. No.

10 Q. -- that's -- okay.

11 A. No. And what I was trying to point out is that
12 they're not identical, so I need to take a look and
13 see what the data says. Is that okay?

14 Q. I'd like to direct your attention now to
15 conclusion number five. Could you read that,
16 please.

17 A. "Depending on the cigarette blend, the maximum
18 nicotine-to-tar ratio reduction that can be achieved
19 in smoke by acidic additives is about 20 percent,
20 normally 10 to 16"

21 Q. And earlier we were talking about the
22 nicotine-to-tar ratio in a Marlboro Light being about
23 25 percent higher than in the Marlboro Red; is that
24 right?

25 A. I think the numbers are like 14.7 to 1 versus 12

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1 and a half to 1, 2.2 over 12 and a half. It's maybe
2 16 percent if you look at it that way.

3 Q. Okay. Is there any reason that the addition of
4 acidic additives to a Marlboro Light would not result
5 in a sufficient lowering of the nicotine-to-tar ratio
6 to make it equal to a Marlboro Red?

7 A. It's theoretically possible. I don't know if it
8 would taste like a Marlboro Light.

9 Q. Okay. And number four lists several different
10 acids that could be used; right?

11 A. Yes.

12 Q. By the way, it refers to a CA-filter. What is
13 that?

14 A. Cellulose acetate.

15 Q. Are cellulose acetate filters used on either
16 Marlboro Reds or Marlboro Lights sold in Minnesota?

17 A. Yes.

18 Q. Is there anything different about the cellulose
19 acetate filters sold in Saudi Arabia than the ones
20 sold in Minnesota?

21 MR. NUNLEY: Objection, foundation.

22 A. Probably.

23 Q. What's the difference? What would -- what would
24 the differences be?

25 MR. NUNLEY: Objection, foundation.

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1 A. The material that you would select for -- for a
2 more efficient filter may be made of CA, but the
3 form, the -- the cross-sectional look at it, the
4 amount of fiber that you would have in the filter
5 could be significantly different, the amount of
6 ventilation.

7 Q. Okay. And the --

8 The types of acids that can be added to the
9 cellulose acetate filter to re -- to reduce the
10 nicotine-to-tar ratio are described as polycarboxylic
11 acids; correct?

12 A. Yes.

13 Q. And that would include such acids as citric acid
14 and malic acid and tartaric acid; correct?

15 A. Yes.

16 Q. Has Philip Morris ever added any polycarboxylic
17 organic acids to the cellulose acetate filters of any
18 cigarettes sold in Minnesota?

19 A. Not that I'm aware of.

20 Q. Okay. Nicotine does not contribute to the taste
21 of a cigarette, does it?

22 MR. NUNLEY: Excuse me. Are we finished
23 with this document?

24 MR. GORDON: Yes.

25 A. I think it does contribute to the taste.

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1 Q. Did Philip Morris ever conduct any studies to
2 determine whether nicotine contributed to the taste
3 of a cigarette?

4 MR. NUNLEY: Objection, outside the scope
5 of number five of your predesignation, Mr. Gordon.
6 Corey, are you going to attempt to stay within the
7 predesignation or not?

8 MR. GORDON: I believe I'm doing so,
9 Mr. Nunley. I don't agree with your objection. I
10 guess it will be for Judge Fitzpatrick to decide, not
11 you and not me.

12 MR. NUNLEY: Well I think you have some
13 obligation to stay within it, not just to tell me to
14 shut up and get -- and make objections.

15 MR. GORDON: Well I don't think I've told
16 you to shut up, but I would be lying if that
17 phraseology hadn't crossed my mind.

18 MR. NUNLEY: Well I don't care whether
19 you'd be lying or not, but I think you have an
20 obligation, Corey, to stay within the bounds. I
21 don't think you can come in here and say, "Well you
22 can make your objection for the record. I'm going to
23 ask what questions I want." I think you're very
24 prone to tell me about my obligations under the
25 order. I think you bear them, too, in this

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1 instance.

2 MR. GORDON: Well under Minnesota's
3 30.02(f) I can ask this witness any question I want.
4 You can instruct him not to answer for privilege. If
5 it exceeds the scope of a 30.02(f) but the witness
6 has knowledge to testify, he testifies not on behalf
7 of the company. I am entitled to ask him, and if you
8 don't think it's within the scope of the 30.02(f),
9 you go ahead and make that objection, and your
10 objection will be noted for the record.

11 BY MR. GORDON:

12 Q. Do you recall the question?

13 A. No.

14 Q. Has Philip Morris -- let me -- let me -- let me
15 re -- restate it.

16 Did Philip Morris ever conduct any studies to
17 determine whether nicotine contributed significantly
18 to cigarette flavor?

19 MR. NUNLEY: Excuse me, Dr. Houghton.
20 Objection, lack of foundation, outside the scope of
21 this designation.

22 You can answer.

23 THE WITNESS: Oh, thank you.

24 A. There -- there have been experiments, there have
25 been prototype cigarettes made in which the

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1 subjective impact of nicotine has been attempted
2 to -- to -- to be able to identify, yes.
3 Q. Okay. And it's your understanding that those
4 studies concluded that nicotine does contribute
5 significantly to cigarette flavor?

6 MR. NUNLEY: Objection, foundation, outside
7 the scope of the 30.02(f) notice.

8 A. What I recall is that there was a general
9 impression that nicotine contributed to the
10 subjective acceptability of the smoke at the time
11 on -- on some of the experimentation. I'm not --
12 I'm -- one prototype cigarette I recall with -- that
13 I smoked, it had an impact on the taste. I'm not
14 saying it was a positive impact at that time for
15 that -- that one prototype I recall smoking.

16 Q. In fact, nicotine has an aversive taste, doesn't
17 it?

18 MR. NUNLEY: Objection, mischaracterizes
19 his testimony, is outside the scope of the 30.02(f)
20 and lack of foundation.

21 A. I don't -- I don't feel that I can answer that
22 as an expert, that -- that specific question about an
23 aversive taste. What I recall about the denic
24 cigarettes where essentially you had the absence of
25 nicotine, what you did not get as a result of that is

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1 a positive reinforcement in the subjectives of the
2 cigarette.

3 So at least from -- from evaluating that
4 product, I would say that the -- the lack of nicotine
5 had an impact on the subjective acceptability, so
6 the -- some -- to some extent nicotine is making a
7 positive in a normal cigarette for consumers from a
8 subjective point of view.

9 Q. In terms of its taste, though, one of the design
10 criteria that cigarette makers have to consider is
11 that because nicotine tastes so awful, it has to be
12 masked by other components of the cigarette smoke;
13 correct?

14 MR. NUNLEY: Objection, lack of foundation,
15 outside the scope of this 30.02(f) number five and
16 calls for speculation.

17 A. I never tasted nicotine per se myself. Okay?
18 I -- I told you the one -- one prototype I
19 remember -- recall smoking that had nicotine added to
20 it was aggressive and unpleasant. I think there's a
21 balance between tar and nicotine that -- that -- that
22 consumers like, and as long as you stay inside that
23 range, you -- you can make a -- a balance-positive
24 smoking experience for the consumer.

25 Q. You need both the nicotine and the tar to have

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1 that balance-positive experience for the smoker;
2 right?

3 A. I believe that there is a -- an acceptable range
4 out there between tar and nicotine, this -- this
5 ratio of tar to nicotine, that consumers find
6 acceptable.

7 Q. In fact, there is a minimum amount of nicotine
8 needed for smoker satisfaction; right?

9 MR. NUNLEY: Objection, outside the scope,
10 lack of foundation.

11 A. Well if -- if I really believed that, then I
12 certainly shouldn't have pushed to have denic
13 processed, the process developed, the products
14 developed, et cetera. I think you could make a good
15 cigarette in the denic -- of the denic type if you
16 had the right kind of process for removing the
17 nicotine.

18 Q. Okay. And would you agree that there exists a
19 maximum concentration of nicotine in smoke to let the
20 taste -- taste of the smoke be unaffected?

21 MR. NUNLEY: Objection, foundation, outside
22 the scope.

23 A. I really don't know.

24 MR. GORDON: Can I have this marked,
25 please.

1 (Plaintiffs' Exhibit 1304 was marked
2 for identification.)

3 BY MR. GORDON:

4 Q. Showing you what's been marked as Plaintiffs'
5 Exhibit 1304, a document produced by Philip Morris
6 bearing Bates stamp number 2023186690-A, a
7 single-page document dated July 29th, 1987 entitled
8 "NEW TAR QUALITY PYROLYSATES TO DISTILLATES."

9 Up at the top it says "Department S&T, PMNE."
10 Do you know what that stands for?

11 A. Department is science and technology, Philip
12 Morris, and the "NE" should be "Neuchatel."

13 Q. Okay. Is that where you were based when you
14 were in Europe?

15 A. Yes.

16 Q. Is that the department that you ran when you --
17 the three years you were in Europe?

18 A. No. This is not part of research and
19 development there.

20 Q. Science and technology is separate?

21 A. It's a separate function, yes, sir.

22 Q. Okay.

23 A. Or --

24 Q. Who is W. Reininghaus?

25 A. Reininghaus is a -- let's see. It's 1987. He

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1 would have been a scientist at INBIFO.

2 Q. And that was a science -- a scientific research
3 facility owned by Philip Morris; correct?

4 A. Yes.

5 Q. And could you read the very first full sentence
6 of Exhibit 1304.

7 A. I was trying to read it my -- okay. "SUMMARY OF
8 PROJECT.

9 "Any future reduction of tar levels will come
10 into conflict with a twofold limit, as (1) a minimum
11 amount of nicotine is needed for the smoker's
12 satisfaction (ca. 0.8 milligrams per cigarette) and
13 (2) there exists a maximum concentration of nicotine
14 in smoke to let the taste of the latter
15 unaffected" -- "to let the taste of the latter
16 unaffected (less than 10 percent). Therefore, the
17 possible limit of tar reduction will be reached at
18 approximately 8 milligrams."

19 You wanted --

20 Q. That -- that's fine.

21 A. Okay.

22 Q. In terms of designing cigarettes, Philip Morris
23 was aware that a minimum amount of nicotine was
24 needed for smoker satisfaction and there was a
25 maximum amount of nicotine -- excuse me, a maximum

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1 concentration of nicotine that would leave the taste
2 of smoke unaffected; correct?

3 MR. NUNLEY: Objection, assumes facts not
4 in evidence, no foundation for the document, outside
5 this witness's designation and lack of foundation.

6 A. I would -- before I could answer, I would prefer
7 to understand what's in the rest of this thing that I
8 can't see. Okay?

9 Q. Yeah, me too.

10 A. And second of all, I -- I don't know who wrote
11 this, but the department of science and technology
12 was not the department responsible for design of
13 cigarettes, development of cigarettes, nor am I aware
14 of anybody in that -- in that department at that time
15 who would have had that kind of knowledge or
16 experience. I -- I don't know what this project is
17 they're talking about, so it's really hard for me to
18 answer why this person, whoever it was, said this.
19 I'm sorry, I --

20 Q. Is it something you disagree with?

21 MR. NUNLEY: Objection. Is what something
22 he disagrees with?

23 MR. GORDON: That there's a minimum amount
24 of nicotine necessary for smoker satisfaction.

25 MR. NUNLEY: Objection, lack of foundation,

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1 outside the scope.

2 A. I personally believe that we could successfully
3 market denic cigarettes and we are very successful at
4 developing and marketing cigarettes at 1 milligram of
5 tar and .1 milligram of smoke nicotine, and I do not
6 believe that this limit of 0.8 approximately is -- is
7 the lowest level of -- of cigarette delivery that
8 consumers would like. There are a lot of cigarettes
9 in the United States sold that deliver less than
10 8 milligrams, including the brand I would smoke.

11 Q. You --

12 That 1 milligram to -- tar to .1 milligram of
13 nicotine that you just mentioned, is that the Merit
14 Ultima?

15 A. Well it's not just in the United States that is
16 our bestselling 1-milligram cigarette, but the
17 1-milligram market in the U.S. is extremely small
18 compared to other markets around the world.

19 Q. Okay. That's a nicotine-to-tar ratio of
20 approximately 10; right?

21 A. That's a tar-to-nicotine ratio of approximately
22 10, yes, sir.

23 Q. So it's actually about 50 percent a higher
24 nicotine-to-tar ratio than the Marlboro Red; right?

25 MR. NUNLEY: Objection, assumes facts not

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1 in evidence.

2 A. I'd have to do the calculation on an average,
3 but it's somewhere around 14.7 -- 14.7 to 1 I believe
4 is the tar-to-nicotine ratio on a Marlboro Red. This
5 is approximately 10 tar to 1, so it -- it's a --
6 definitely a lower tar-to-nicotine ratio. If you
7 reverse it around, it would be a higher
8 nicotine-to-tar ratio.

9 Q. By about 50 percent; right?

10 A. I -- I assume so without doing it.

11 Q. In designing cigarettes, Philip Morris has
12 learned that there's an optimal dose of nicotine;
13 correct?

14 MR. NUNLEY: In designing cigarettes?

15 MR. GORDON: Uh-huh, yes.

16 A. I -- I'm not even sure what those words mean,
17 optimum dose.

18 Q. Well too little or too much is rejected by
19 tobacco smokers.

20 A. What consumers prefer most is their brand that
21 they're smoking. Okay? That's their preference.
22 They may not like a cigarette that had a higher tar
23 and nicotine delivery or much lower tar and nicotine
24 delivery, but each consumer's preference, which I --
25 I would consider to be optimum, is what they're

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1 smoking. A Marlboro Red smoker would prefer a
2 cigarette that's roughly 16 milligrams of tar to 1 --
3 1 milligram of smoke nicotine, so for that consumer
4 the optimum product would be 16/1.0.

5 MR. GORDON: Can I have that marked.

6 (Plaintiffs' Exhibit 1305 was marked
7 for identification.

8 BY MR. GORDON:

9 Q. Dr. Houghton, I'm showing you what's been marked
10 as Plaintiffs' Exhibit 1305, a document produced by
11 Philip Morris bearing Bates stamp number 2028635742,
12 a single-page document at the top --

13 A. Uh-huh.

14 Q. -- that says "SEARCHMANAGER 370 - DOCUMENTS
15 PRINTED FROM DATA BASE: CONF."

16 A. Yes.

17 Q. Okay. This refers to a -- a C. Jeanneret as an
18 author. Do you see that?

19 A. Yes, I do.

20 Q. Do you know who that is?

21 A. I've heard of him, but I -- he was not in
22 Neuchatel when I was there.

23 Q. Okay.

24 A. This -- this must have been before that -- oh,
25 "PUBLICATION DATE 1975," yeah. I've just heard of

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1 him.

2 Q. Jeanneret was an -- was an employee of Philip
3 Morris's Neuchatel operations; correct?

4 A. Jeanneret, right.

5 Q. Jeanneret. And this is a abstract of a research
6 paper that Jeanneret had written; is that correct?

7 MR. NUNLEY: Objection, foundation.

8 A. I -- can I take a quick read of it --

9 Q. Sure.

10 A. -- just to make sure?

11 (Witness reviews Plaintiffs'

12 Exhibit 1305.)

13 A. Okay.

14 Q. Okay. And this document says, quote,

15 "APPARENTLY THERE IS AN OPTIMAL DOSE OF NICOTINE; TOO
16 LITTLE OR TOO MUCH IS REJECTED BY TOBACCO SMOKERS."

17 Do you see that?

18 A. Yes, I see that.

19 Q. Okay. Is that something you agree with or
20 disagree with?

21 MR. NUNLEY: Objection, lack of foundation,
22 outside the scope.

23 A. I -- I -- I don't know what he's referring to.

24 I -- you know, too little or too much, I think if you
25 say it's too little or you say it's too much, you're

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1 already saying it's -- it's not good, okay, just the
2 words, but I believe that consumers have a preference
3 for the kind of cigarette that they are presently
4 smoking. They prefer what they smoke. If you adjust
5 the cigarette down in delivery, they -- and it's not
6 a huge difference, they may not reject it. But the
7 fact is that consumers, I believe, are moving down in
8 their preferences and consumers start to like their
9 new cigarette and then soon it becomes their
10 optimum.

11 So I think -- I think it depends upon the
12 consumer. They move down in delivery. They move
13 down in tar, and they -- they like -- when they get
14 to the next level, they like it, and pretty soon
15 that's their optimum or their preferred. I -- I
16 think you can take the consumer down in tar and
17 delivery as long as you're providing them with a good
18 taste. They'll -- they'll accept that. They'll --
19 they'll move down.

20 So I think it's wrong to say that there's too --
21 you know, too little would be rejected by tobacco
22 smokers. There are countries today where you have
23 15 percent of the market is basically 1-milligram tar
24 product.

25 Q. And 1 milligram of nicotine?

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1 A. One-tenth of a milligram, yes.

2 Q. Excuse me. One-tenth of a milligram, right.

3 A. Yes.

4 So no, I cannot agree with what this man said in
5 1975.

6 Q. So consumers will buy cigarettes that have as
7 little as .1 milligram of nicotine; right?

8 MR. NUNLEY: Objection, foundation and
9 outside the scope.

10 A. There -- there are some products that are
11 successful in the United States at 1 milligram of
12 tar, .1 smoke nicotine, and -- and there are other
13 markets where -- where they're very successful, more
14 successful relative than -- than the U.S.

15 Q. And a cigarette with 97 percent of its nicotine
16 removed was not successful in the United States;
17 right?

18 A. I think that cigarette was not. I'm not saying
19 that our competitors might not find a way to
20 successfully do that and I'm not saying that Philip
21 Morris might not find a way to successfully do that.
22 I certainly wish that thing had been as commercially
23 successful as we had been with, say, 1-milligram
24 cigarettes in other markets.

25 Q. The primary reason people smoke is to deliver

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1 nicotine into their bodies; correct?

2 MR. NUNLEY: Objection, foundation and
3 scope.

4 A. There are obviously people who believe that the
5 only reason people smoke is for that.

6 Q. I said "the primary reason."

7 A. Oh, the primary reason. Excuse me. There are
8 people who believe that, yes.

9 Q. People within Philip Morris?

10 A. Absolutely.

11 MR. NUNLEY: Objection. Excuse me.
12 Objection, foundation, outside the scope.

13 A. I have seen documents that indicate people at
14 Philip Morris believe that too.

15 Q. Did you believe that when you were at Philip
16 Morris?

17 A. I did not believe that the primary reason for
18 people to smoke was to get -- if you -- to get
19 nicotine -- what's it say?

20 Q. To deliver nicotine into their bodies.

21 A. I did not believe that's the primary reason for
22 people to smoke.

23 Q. What do you believe is the primary reason?

24 MR. NUNLEY: Mr. Gordon, I really think
25 this is way beyond the scope and you're -- you seem

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1 to be acknowledging that perhaps it is, but I think
2 that it is. I object on that basis and lack of
3 foundation.

4 A. I think that this is an area that is probably
5 better addressed by Dr. Ellis.

6 Q. Okay. Fair enough.

7 A. Okay.

8 Q. I -- I asked you to let me know that, and
9 that's --

10 A. Okay.

11 Q. -- fine.

12 Would you agree that it would be improper for
13 Philip Morris to add anything to its cigarettes that
14 would make it more difficult for people to quit if
15 they chose to quit?

16 MR. NUNLEY: Objection, outside of the
17 scope.

18 A. Whew, another area that's probably better
19 addressed by Dr. Ellis than -- than I. I mean, if I
20 talk about an issue like that, it's not with a
21 technical background or a basis for it.

22 Q. It is possible to modify the pH of cigarettes;
23 correct?

24 A. As long as we're -- we can agree on what the
25 word "pH" means for cigarettes. There are

1 methodologies for measuring what's called a pH of
2 tobacco smoke. Relative to the cigarette itself, I
3 don't know how you measure pH of the cigarette.
4 Relative to the smoke, you really can't measure pH of
5 the smoke per se, but if -- if you bubble the smoke
6 through -- through a, oh, water solution, you can
7 measure the pH of that solution there. And there has
8 been work done which measures the pH of whole smoke,
9 yes. That can be measured.

10 Q. And there are chemicals that can be added to
11 cigarette filler that affect the pH of the smoke;
12 correct?

13 MR. NUNLEY: Mr. Gordon, this is a specific
14 area that I told you when we had the conversation
15 that would be within Dr. Ellis's realm. And if you
16 want to pose a question to Dr. Houghton, you can do
17 it, you know.

18 MR. GORDON: He's -- he's capable of
19 telling me when it's -- when it's in Ellis's
20 bailiwick. If -- if he wants to agree with that,
21 that's fine.

22 MR. NUNLEY: But that's not necessarily
23 his -- his responsibility to do that. I mean, you
24 know that I told you pH is an issue that Dr. Ellis
25 would be handling.

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1 And, Corey, if you're going to -- I don't think
2 you can -- you can pose the same questions to both
3 witnesses.

4 MR. GORDON: Well if he can answer it, I --
5 then I maybe don't have to waste my time with Ellis.

6 MR. NUNLEY: Well it's not a matter of
7 wasting your time. It's a matter of we had a
8 conversation about this, and I told you Dr. Ellis
9 would handle questions about pH and issues relating
10 to manipulation. And you didn't take any issue with
11 that.

12 A. I -- I'd prefer that you not waste your time
13 with me on it.

14 MR. GORDON: Okay. Thanks.

15 MR. NUNLEY: Good.

16 THE WITNESS: Thank you, Gordon.

17 THE REPORTER: Off the record, please.

18 (Luncheon recess taken at 1:02 o'clock
19 p.m.)

20

21

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1 AFTERNOON SESSION

2 (Deposition reconvened at 2:25 o'clock
3 p.m.)

4 (Witness sworn.)

5 MR. NUNLEY: Let me just one housekeeping
6 matter, Corey. You asked Ms. Purcell this morning
7 some questions about some documents related to
8 production. I have obtained some information that I
9 think will answer some of the questions you had about
10 these, and I'm prepared to give it to you on the
11 record and would like to do that now, and I think
12 it's appropriate to do it.

13 MR. GORDON: Well I understood time was a
14 problem and we're --

15 MR. NUNLEY: It's going to take --

16 MR. GORDON: -- and we're not going to do
17 Category II issues this afternoon.

18 MR. NUNLEY: It's not going to take me very
19 long. I mean, if --

20 MR. GORDON: Go ahead.

21 MR. NUNLEY: All right. It relates to what
22 you marked as 1301, and particularly 1301 is Bates
23 number 2059507100. It is not a Category II
24 document. I think you referred to it as a
25 Category II document. It is a file folder. It was

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1 produced to you, as I understand it, yesterday, I
2 believe, in a non-designated box. That was box
3 number 12036. Documents in that file, Corey, are
4 numbered 2059507101 through 7205. Those documents
5 represent the content of the box. They were produced
6 to you in Category II box 12035. There is a document
7 7206 in that same Bates range through 7211 -- 7211.
8 It is not a responsive document and was not
9 produced.

10 The next document is a file folder for a
11 Marlboro -- it says "MARLBORO FORMULAS." It is not a
12 Cat II document. This is 2059507212. It is indeed a
13 copy of a file folder. It's not a Category II. It's
14 not designated. It was produced to you in box
15 12036. It had within it documents range 2059507213
16 through 72 -- no, excuse me. It did not have within
17 it that. I'm sorry, it did. It had within it Bates
18 range 2059507213 through 7215, which were produced to
19 you in Category II box 12035.

20 The next is -- is another file folder,
21 2059507216, labeled "Tobacco Extracts/Alcohol." It
22 was produced to you in the non-designated box. Its
23 contents, which are Bates numbers 2059507217 through
24 7240, were produced to you in Cat II box 12035.

25 And a third file folder, 2059507242, which is

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1 identified as "Signed & Complete," was produced in
2 non-designated box 12036, and its contents, 7243
3 through 7291, were produced in a Category II box
4 12034.

5 (Discussion off the stenographic record.)

6 ELLEN MERLO

7 called as a witness, being first duly
8 sworn, was examined and testified
9 as follows:

10 ADVERSE EXAMINATION

11 BY MR. GORDON:

12 Q. Would you state your full name for the record,
13 please.

14 A. Yes. It's Ellen Merlo.

15 Q. Who is your present employer?

16 A. Philip Morris USA.

17 Q. What is your title?

18 A. Senior vice president of corporate affairs,
19 Philip Morris USA.

20 Q. And you're here today to testify on behalf of
21 Philip Morris as to issues related to youth smoking;
22 is that correct?

23 A. I am.

24 Q. Okay. And you are designated as the person most
25 knowledgeable within Philip Morris related to youth

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1 smoking issues; correct?

2 A. I am the person designated for Philip Morris as
3 the most knowledgeable about our policies and
4 practices as they apply to youth smoking.

5 Q. And it is the policy of Philip Morris to oppose
6 youth smoking; correct?

7 A. To oppose youth smoking, yes, it is.

8 Q. How long has that been Philip Morris's policy?

9 A. As long as I can remember, and I've been with
10 the company for 28 years.

11 Q. And how much before that was it Philip Morris's
12 policy to be opposed to youth smoking?

13 MR. HOWARD: Objection. You may answer if
14 you know.

15 A. As long as I can relate to. I mean, I can't
16 give you a year, but for many, many years it's always
17 been our policy to not market to and to support
18 programs that evolved over the years against youth
19 marketing.

20 Q. Well, would it be correct to say that it has
21 been Philip Morris policy to be opposed to youth
22 smoking as far back as the 1950s?

23 A. It's hard for me to answer because I was not
24 part of Philip Morris in the 1950s, but as long as I
25 know and as long as I've been associated with the

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1 company and been involved with the company in
2 upholding its practice -- practices and policies, we
3 have had a stand on the issue of youth smoking.

4 Q. Okay. Did you do anything to prepare yourself
5 to testify today to be able to fill in the knowledge
6 prior to your personal involvement with Philip
7 Morris?

8 A. I've -- I had a session with counsel.

9 Q. Okay. And other than that, did you do anything
10 to find out what Philip Morris's policies were with
11 respect to youth smoking before you became employed?

12 MR. HOWARD: Objection. You can answer.

13 A. No, I did not.

14 Q. So you're relying on what counsel told you?

15 MR. HOWARD: Objection.

16 A. No, I'm -- I'm relying on what I know from
17 personal experience, what I know about the company,
18 what I know about my colleagues who were with the
19 company before I joined it and what their position
20 has been and my general understanding of what our
21 corporate policy has been in all these years.

22 Q. But you didn't undertake anything specific to
23 familiarize yourself with those policies in order to
24 prepare yourself to testify today as the spokesperson
25 for Philip Morris on the issue of youth smoking?

1 A. I did not.

2 MR. HOWARD: Objection. Objection, just
3 clarify the policies and time period. I take it that
4 question was the time period --

5 MR. GORDON: Right.

6 MR. HOWARD: -- before --

7 MR. GORDON: Right.

8 MR. HOWARD: -- she joined the company.

9 THE WITNESS: Yes.

10 Q. You understood that?

11 A. I did and I -- and I answered it.

12 Q. Okay. And it's Philip Morris's publicly stated
13 position that advertising does not encourage people
14 to smoke; correct?

15 A. That is our public position, that advertising in
16 itself -- in and of itself is not something that
17 would get someone to -- to smoke or not to smoke.

18 Q. And it's your position that advertising does not
19 in any way make smoking appear to be attractive to
20 youth; correct?

21 MR. HOWARD: Objection.

22 A. I don't believe that advertising makes smoking
23 attractive to youth.

24 Q. What does Philip Morris believe?

25 A. I can't speak on behalf of what Philip Morris

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1 believes as far as -- as advertising in general, but
2 I can tell you that we don't believe that the
3 existence of advertising in and of itself would be
4 something that would encourage a young person to
5 smoke.

6 Q. So when you say Philip Morris doesn't market to
7 kids, what is it it doesn't do?

8 A. Well, first of all, there are a lot of things we
9 don't do to ensure that kids don't have access to our
10 cigarettes, and there are a lot of things we do do to
11 make sure that kids don't have access to our
12 cigarettes. So we're also proactive in this area,
13 but we certainly follow an advertising and
14 promotional code. We've subscribed to a sampling
15 code. We are very careful in the placement of our
16 advertising as far as the magazines that we employ,
17 but beyond that we've taken proactive measures with
18 the introduction of our AAA, Action Against Access
19 initiative, many of our practices throughout the
20 years to ensure that young people don't have access
21 either to our products, nor to some of the programs
22 that we offer.

23 Q. You say you're careful in the placement of
24 advertising as far as magazines are concerned.

25 A. That's correct.

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1 Q. Why?

2 A. Why? Because we -- first of all, as a good
3 marketer, one tends to focus on your audience, and
4 our audience is adult smokers. I mean, that's who we
5 want to reach with our message, and that's where we
6 spend our advertising dollars, because that makes
7 good business sense.

8 Beyond that, we have no interest in focusing our
9 message on young people, and therefore we don't
10 advertise in publications that are read by young
11 people.

12 Q. How do you make that determination?

13 A. Oh, by --

14 MR. HOWARD: Objection. What
15 determination?

16 MR. GORDON: As to whether or not magazines
17 are read by young people, certain magazines.

18 A. There is readily available data through the
19 magazine companies themselves. They're fully
20 audited. They have readership numbers. They have
21 demographic numbers, statistics, et cetera.

22 I mean, it's a -- it's a whole process of
23 selection when you're thinking about a media campaign
24 as to how you evaluate what magazine you might
25 advertise in or not. Even smoking indices exist for

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1 various readership bases.

2 Q. In terms of the youth demographics, is there any
3 kind of percentage threshold that triggers your
4 decision not to advertise in a particular magazine?

5 A. Yes, about 15 percent under the age of -- of
6 21.

7 Q. So if 15 percent or more of a magazine's
8 readership are under the age of 21, you won't
9 advertise in it; is that correct?

10 A. That's normally our policy, yes.

11 Q. So in other words, if -- even if 85 percent of
12 the readership is over 21, you would decline to
13 advertise in it?

14 A. Well, I mean, you're -- you're -- you're cutting
15 that number very thin. I said 15 -- under 15
16 percent, so if 85 percent were over, I mean, it would
17 just -- that would be a borderline case, wouldn't it,
18 and I'd have to know what magazine you were talking
19 about?

20 Q. Okay.

21 A. But in general, that would be correct.

22 Q. Why?

23 A. Why what?

24 Q. If a magazine had 85 percent read -- readership
25 in excess of 21, why wouldn't you place your ads

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1 there?

2 A. I'm not sure that we wouldn't. That's what I'm
3 saying to you, that I -- I'm not -- I'm not
4 understanding the distinction that you're making
5 between the 15 percent under and 85 percent over. To
6 me, that would be exactly the same demographic unless
7 I'm missing something.

8 Q. Okay. My question is -- is, if I understand you
9 correctly, you're saying if a magazine's readership
10 is 15 percent or more under the age of 21, you will
11 decline to advertise. And my question is: If a
12 magazine like that exists; in other words, 15 percent
13 of its readership is under 21, but then twenty --
14 excuse me, 85 percent of its readership is over 21,
15 why wouldn't you advertise in that magazine?

16 A. Because, in our opinion, there would be too much
17 of the readership that was too young to -- for us to
18 place our advertising.

19 Q. Well what difference does it make if the
20 readership sees your advertising if you believe that
21 advertising doesn't do anything to encourage young
22 people to smoke?

23 A. Well I still think it's -- it's good practice
24 not to focus your advertising on an audience that
25 you're not interested in reaching or selling to, and

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1 I -- I -- I thought I did make that -- that point
2 before, that in fact it's only good business practice
3 aside from good public policy to advertise in those
4 publications where you're going to reach the --
5 the -- the -- the largest share of potential
6 consumers, and those are adults, and in our case they
7 are adult smokers. And we tend to choose
8 publications that by their editorial content, by
9 their readership, et cetera, appeal to adult
10 smokers.

11 Q. Okay. So it's an economic decision and not a
12 decision to avoid advertising to youth?

13 A. I think you're just taking one part of my
14 testimony. I said it is good business policy as well
15 as good public policy; it's both. You asked me for
16 an explanation for one piece of it and I'm giving it
17 to you, but we also have public policy about youth
18 and making sure that we do not target our message to
19 youth because we are not interested in attracting
20 them to our product. More importantly, we're very
21 supportive of denying them access, so aside from the
22 things that we don't do, we very proactively do other
23 things to deny mi -- minors access to our products.

24 Q. I know you want to talk about access and we'll
25 talk about access, but I want to talk about marketing

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1 right now.

2 A. All right.

3 Q. You say you're not interested in attracting
4 youth to your product.

5 A. That's correct.

6 Q. Okay. But you don't believe advertising does
7 attract youth to your product; right?

8 A. I don't --

9 MR. HOWARD: Objection to the term
10 "product" here. It's ambiguous, but you may
11 answer.

12 A. I don't believe that advertising is a primary
13 reason that young people smoke or choose to smoke.

14 Q. Is it a secondary reason?

15 A. I -- it's hard. I don't know. I don't know
16 that for a fact. I'm not an expert on why young
17 people do what they do or don't do what they do. All
18 I can tell you is it is my personal belief that
19 advertising is not the cause, and I think that, as I
20 look around the world at other models, that has been
21 borne out. There are many places in the world that
22 have banned advertising totally, and when they
23 haven't combined that with some sort of a prevention,
24 educational, denying-access program, in fact smoking
25 incidence among young people goes up; it doesn't go

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1 down.

2 So I would have to say that singling advertising
3 out as a cause would not be an accurate way to
4 portray what advertising does.

5 Q. Does Philip Morris believe that advertising
6 plays any role in attracting people to smoke, even if
7 it's not the primary reason?

8 A. It may play some role in product choice, which
9 is what our belief is, that advertising in fact in a
10 mature product category like cigarettes would play
11 and does play a role in influencing those adults who
12 have made the choice to smoke to pick one product
13 over another.

14 Q. So Philip Morris believes that advertising can
15 play a role in influencing people which brand to
16 start smoking?

17 MR. HOWARD: Objection, mischaracterizes
18 the testimony.

19 A. Yes, I -- I don't think I said "start." I
20 said --

21 Q. I'm asking you about starting.

22 A. I -- I -- I don't believe that in a mature
23 product category like cigarettes that advertising
24 plays a role in persuading someone to start doing
25 something that they hadn't already made a decision to

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1 do. I think it aids brand choice.

2 Q. I'm going to re-ask my question. I'm going to
3 move to strike that last answer as nonresponsive.

4 Does Philip Morris believe that advertising can
5 play a role in influencing people which brand to
6 start smoking?

7 MR. HOWARD: Objection. I think the answer
8 was entirely responsive, and I -- I object to your
9 characterization of her testimony. You may answer
10 again.

11 A. I really can't give you a "yes" or "no" based on
12 the way you've asked me the question. I'm trying to
13 tell you what my understanding and belief is, and
14 that is that advertising certainly can play a role in
15 influencing brand choice, but I would assume that the
16 decision to smoke had already been made when that
17 brand choice is being considered.

18 Q. And I'm asking you once somebody has made the
19 decision to start smoking --

20 A. Yes.

21 Q. -- Philip Morris believes that advertising can
22 influence what their brand choice will be for their
23 first cigarette; correct?

24 A. Oh, I don't know -- I don't know the answer to
25 that. I -- I would assume that it could, but

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1 certainly peer pressure and what was soc -- you know,
2 the social group that the person belonged to, what --
3 what their friends were smoking, et cetera, would
4 have more of an influence as to what their brand
5 would be.

6 Q. Okay. Again I move to strike as nonresponsive.
7 I'm asking you if advertising plays a role, not the
8 role, not the sole role.

9 Does Philip Morris believe that advertising
10 plays a role in influencing people to select the
11 first brand to start smoking once they've made a
12 decision to smoke?

13 A. I don't know the answer to that.

14 Q. Who would know the answer on behalf of Philip
15 Morris?

16 A. I don't know. Maybe someone in the marketing
17 area could give you that answer.

18 Q. And I take it you did nothing to familiarize
19 yourself with Philip Morris's position on that
20 question.

21 MR. HOWARD: Objection. You know, Counsel,
22 that the -- the next witness you have is someone to
23 address marketing, advertising and promotion of
24 cigarettes.

25 Q. Do you remember my question?

1 A. No. Why don't you ask it again. I didn't -- I
2 don't remember it.

3 Q. I take it you did nothing to familiarize
4 yourself with Philip Morris's position on that
5 question.

6 A. I wouldn't say I've done nothing. I've tried to
7 explain to you what I believe our position to be.
8 You don't want to accept that answer, but I really
9 have tried to be very responsive to your question.
10 Q. My question -- and I'm going to move to strike
11 that as nonresponsive. My question is: Did -- you
12 did nothing to familiarize yourself with Philip
13 Morris's position on the question of whether
14 advertising influences brand choice for starters;
15 correct?

16 MR. HOWARD: Objection.

17 A. I would not say that's correct. I've worked for
18 the company for 28 years. I really do believe I
19 understand our position on -- on many issues. I just
20 don't think that our position necessarily falls into
21 a yes-or-no answer, and that's why I've tried to be
22 responsive in answering your question.

23 Q. So is it your testimony that Philip Morris as a
24 company hasn't a clue as to whether advertising plays
25 any role whatsoever in influencing brand choice for

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1 starters?

2 A. I did not say that. I think you've
3 mischaracterized what I've been saying. I believe
4 that advertising does play a role in influencing
5 brand choice for people who have made the decision to
6 smoke.

7 Q. I appreciate you sharing your beliefs, but I
8 want to know --

9 A. And I believe Philip Morris believes that as
10 well.

11 Q. Is that Philip Morris's position?

12 A. I -- I believe it is, yes.

13 Q. Okay. And obviously Philip Morris wants people
14 to choose its brands over competitors' once they have
15 made a decision to choose to smoke; correct?

16 A. That's correct.

17 Q. Okay. Whether they choose to smoke at 21 or 25
18 or 30 or 50, Philip Morris wants them to choose
19 Philip Morris brands when they made -- make the
20 decision to start smoking; right?

21 A. That is correct.

22 Q. Okay. And when they're 18, Philip Morris wants
23 them to make the decision to choose Philip Morris
24 brands; right?

25 A. That is correct.

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1 Q. And if they make a decision to choose to smoke
2 before they turn 18, all other things being equal,
3 Philip Morris would rather they choose Philip Morris
4 products than a competitor's brand; right?

5 A. No, that is not correct, because we don't want
6 them to choose any brand, not ours, not a
7 competitor's. We don't want young people to smoke.
8 I can't be clearer about that, and if you really want
9 Philip Morris's position, that's it.

10 Q. Why?

11 A. Why? Because we believe that smoking has some
12 inherent risks. There are risk factors associated
13 with smoking, and there are any number of issues that
14 minors should not be making decisions about, smoking
15 being one of them. And we don't want kids to smoke,
16 nor do we want them to have access to our products.

17 Q. Why do you believe that minors should not be
18 making decisions about smoking?

19 MR. HOWARD: Objection. She just answered
20 that.

21 A. For the reason I just stated, because I believe
22 that there are risk factors and I think that minors
23 do not necessarily have all of the information that
24 they need to have to make decisions about smoking as
25 well as many other issues that involve risk, and

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1 therefore those are decisions best left to adults.

2 And we believe these are adult decisions, and

3 therefore minors shouldn't make them, nor should they

4 have access to the product.

5 Q. What does Philip Morris believe is --

6 constitutes all of the information that people should

7 have about smoking before they choose whether or not

8 to smoke?

9 A. I think people should know all of the risks that

10 can be involved. I think they need to weigh what

11 they see as -- as the -- the -- the pleasure of

12 smoking against what some of the stated risks that

13 have been discussed by others and -- in society and

14 have all of that information and be able to weigh it

15 in a way to make an informed decision. And that is

16 something that should be left to an adult. I think

17 the same thing is true about many other areas.

18 Q. What are the risks involved that Philip Morris

19 believes youth are not -- should not be weighing

20 until they become adults?

21 A. Well there -- there obviously have been -- and

22 it's been made -- there's a lot of publicity about

23 the fact that there -- there could be for some people

24 health risks involved in smoking, and if there are,

25 people should be aware of the possibility before they

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1 make a decision.

2 Q. Are there health risks in smoking?

3 A. I don't know that for a fact, but there could be
4 and there -- there could be for some people.

5 Q. How can somebody make a decision weighing the
6 facts and knowing all of the information if you don't
7 know whether there is a risk --

8 A. Well --

9 Q. -- or not?

10 MR. HOWARD: Objection, calls for
11 speculation, but you can answer.

12 A. I don't think I make the decision for somebody
13 else, but there certainly is an enormous amount of
14 literature on both sides of the issue out there.
15 There are published warnings. There are
16 discussions. There are Surgeon General's reports.
17 There are reports from other people. There are
18 positions that -- that we've taken.

19 There's a lot of information publicly available
20 to people on the issue of cigarettes and smoking, and
21 I believe that an adult should read that information,
22 understand it from every perspective and then make a
23 decision for themselves as to what's right for them
24 and weigh what they see as the pleasures against what
25 they see as the risks and then decide whether or not

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1 they choose to smoke. And if they do choose to smoke
2 as an adult, I believe that should be respected; that
3 choice should be respected. I do not believe it is a
4 choice that a minor should make.

5 Q. And one of the reasons Philip Morris believes
6 that that is a decision that a minor should not make
7 is because a minor lacks the maturity to fully assess
8 the risks and weigh them against the possible
9 benefits; correct?

10 A. That -- yes, that's what I believe and that's
11 what Philip Morris believes, I believe.

12 Q. And Philip Morris believes that that decision
13 should not be made until a person has fully matured
14 to adulthood to be able to make those risks; right?

15 A. Until a person, yes, is no longer considered a
16 minor and is an adult, that's correct.

17 Q. Okay. And Philip Morris believes that should --
18 that the decision should not be made when a person is
19 in transition from adolescence to adulthood; right?

20 MR. HOWARD: Objection.

21 A. I -- I guess -- yes, I guess so. I mean, I
22 thought I answered that, but okay.

23 Q. Earlier you said that in selecting magazines you
24 avoid magazines where readership is greater than 15
25 percent for people over 21; is that correct?

1 MR. HOWARD: Under 21, I believe.

2 A. Under 21, I think.

3 Q. Excuse me, under 21.

4 Why do you pick the figure 21?

5 A. Well we -- we pick the figure 21 because in many
6 of the programs that we control ourselves, like our
7 direct marketing and our advertising, et cetera, we
8 build in what we see as a cushion between what is the
9 legal age to smoke and what is considered a adult by
10 almost every state in the union except for three that
11 set their -- their minimum age at -- at 19. But as
12 far as the draft is concerned, it's 18. Voting age
13 is 18. So that pretty widely across this country 18
14 is seen as adulthood.

15 We want to make sure that our message is not --
16 and our programs are not drifting down to anyone
17 below the legal age, so where there is no
18 face-to-face transaction where age can be verified,
19 et cetera, we want to make sure that we are not
20 reaching a younger audience, and therefore we build
21 that cushion into the programs that we're responsible
22 for.

23 Q. That's something Philip Morris has chosen to do;
24 right?

25 A. That is correct.

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1 Q. Okay. And --

2 And Philip Morris has undertaken to build in
3 this cushion to avoid potentially reaching people
4 under the legal age; correct?

5 A. That is correct.

6 Q. Okay. And I take it you would agree and Philip
7 Morris would agree that it's difficult to make the
8 distinction between somebody who's a day past their
9 18th birthday and somebody who's a day away from
10 their 18th birthday in terms of marketing.

11 A. I think that's correct unless you can verify an
12 age, and -- and obviously at point of sale where
13 carding goes on and age verification goes on, you can
14 tell the difference between a day before and a day
15 after.

16 Q. I'm talking about marketing. In terms of
17 marketing appeal, it's difficult to fashion a
18 marketing or advertising campaign that appeals to
19 somebody who's 18 years and 1 day that avoids
20 appealing to somebody who's 17 years and 364 days
21 old; right?

22 MR. HOWARD: Objection as to form. You can
23 answer.

24 A. I -- I guess so, yes. I -- I would say that's
25 probably --

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1 Q. Well I'm trying -- I -- I guess I'm trying to
2 understand the cushion. But if you advertise to
3 somebody who's 21 --
4 A. Uh-huh.
5 Q. -- and you direct your marketing to somebody
6 who's at least 21 --
7 A. That's right.
8 Q. -- you may end up picking up some 20-year-olds
9 in that?
10 A. That's exactly right.
11 Q. You may even pick up some 19-year-olds in
12 there?
13 A. That's right.
14 Q. But if you -- if you -- if you have the bottom
15 as 21, you're -- you're hoping, your intent is to
16 avoid inadvertently picking up some 17-year-olds or
17 16-year-olds?
18 A. That's correct.
19 Q. Because if you marketed to somebody who was 18,
20 you might inadvertently pick up some 17- and
21 16-year-olds along the way; right?
22 A. That's correct.
23 Q. Okay. You mentioned a Cigarette Advertising
24 Code. That's something that -- that Philip Morris
25 and the industry signed on to back in the early '60s;

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1 correct?

2 A. That's correct.

3 Q. Okay. And Philip Morris has continuously
4 subscribed to the -- to this voluntary Cigarette
5 Advertising Code; correct?

6 A. Yes.

7 Q. And always tried to adhere to it; correct?

8 A. That is correct.

9 Q. You would agree that marketing -- strike that.
10 In the Cigarette Advertising Code, it also has
11 this concept of -- of avoiding marketing to anyone
12 under the age of 21; right?

13 MR. HOWARD: Objection.

14 A. It has -- it has some provisions about how to
15 conduct marketing activities to avoid reaching anyone
16 under the age of 21, yes.

17 Q. Okay. And --

18 And that's based, as far as you know, on this
19 similar concept of a cushion; right?

20 MR. HOWARD: Objection, lack of
21 foundation.

22 A. Yeah, I'm -- I'm -- I wasn't there when the code
23 was written so I'm not sure what the thinking was,
24 but I certainly am aware of the code.

25 Q. You would agree that any marketing that was

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1 intentionally designed to appeal to 18-year-olds
2 would be a violation of Philip Morris's own adopted
3 policy to market only to those 21 and older; right?

4 MR. HOWARD: Objection.

5 A. I think you -- I think you've somewhat
6 misinterpreted what I said. I said when we control
7 the distribution of an item, et cetera, we adhere to
8 that. Now there is marketing because I think
9 marketing is very broad and it includes promotion and
10 point of sale and a lot of forms of advertising where
11 there can be age verification. We believe that the
12 minimum age is the age at which an adult can make the
13 decision to smoke or not and to purchase or not, and
14 we certainly do market our product at point of sale
15 where that age verification can take place. Where
16 there is no age verification, we try to build that
17 cushion in through our direct-mail programs; when we
18 sampled, which we no longer do, by making sure that
19 the recipient of the sample was 21 years of age and a
20 smoker, et cetera.

21 So we took those precautions in the programs
22 that we personally implemented where there was no
23 direct proof-of-age carding required to build a
24 cushion in, but that does not mean that we have not
25 marketed to legal-age smokers, and those are 18 and

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1 above.

2 Q. Perhaps I'm not using the right term, and I
3 apologize. When you place an outdoor billboard,
4 there's no age verification as to who can see that
5 billboard; right?

6 A. That's correct.

7 Q. Okay. Actually one of Philip Morris's policies
8 that it -- that it has voluntarily undertaken is to
9 avoid placing billboards within 500 feet of schools;
10 correct?

11 A. That's part of a voluntary code, that's
12 correct.

13 Q. Why is that?

14 A. Again, one, because of our stated public policy
15 of not either targeting or encouraging young people
16 to smoke in any way; and secondly, I think I made
17 this point when I talked about advertising in
18 general, that you tend to place your advertising
19 where you think you're going to reach the largest
20 number of your -- your own potential consumers, which
21 in our case would be adult smokers.

22 Q. You used the phrase "not targeting." You agree
23 that it is possible for an advertising campaign to
24 target a particular age segment; correct?

25 A. I believe that it is possible for an advertising

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1 campaign to have more appeal to one age segment than
2 another, yes.

3 Q. Okay. And I want to go back and clarify this
4 issue of the cushion because I -- maybe we weren't
5 talking the same language.

6 I'm talking about advertising campaigns and
7 their appeal. Is it your testimony that Philip
8 Morris avoids undertaking any advertising campaigns
9 that -- that have appeal to those under 21?

10 A. I think it's hard to -- to draw that -- that
11 distinction. All I can say to that point is that we
12 believe that adults of legal age can be marketed to
13 in a variety of ways, and the fact that there might
14 be appeal of advertising to someone who is of legal
15 age, in my opinion and I think in the company's
16 opinion, would not be problematic.

17 But then it's a matter of how you implement, how
18 you place that advertising, how you choose the
19 vehicles that you advertise in and how responsibly
20 you market your product. And when it comes to the
21 way we implement our programs and the responsibility
22 that we feel for the way we implement them, we build
23 in some safeguards and cushions.

24 But I think it would be wrong to indicate that
25 we don't believe that 18-year-olds have the right to

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1 choose to smoke as adults, and that if they make that
2 choice, we are marketing our product to them.

3 Q. Let me see if I can ask my question a little bit
4 differently.

5 Philip Morris spends millions of dollars a year
6 on advertising; right?

7 A. Yes, we do.

8 Q. Billboards, magazines?

9 A. Yes.

10 Q. Displays on buses, things like that?

11 A. In some places we use buses.

12 Q. And Philip Morris hires advertising agencies to
13 help design the advertising campaigns to be used in
14 the -- these advertising?

15 A. We work with agencies, that's correct.

16 Q. Okay. And one of the things that these agencies
17 try to do is design ads that would be most appealing
18 to potential customers; right?

19 A. Well I think it's not quite that simplistic. I
20 think what the agency does is to try to position the
21 product to communicate what that product's attributes
22 are, what it tastes like, what unique features it
23 might have in packaging, filter, et cetera, and then
24 yes, to position it in a way that it will appeal to
25 the adult smokers that it is trying to reach.

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1 Q. Okay. And my question now is: In packaging the
2 product and to try and make it appeal to adult
3 smokers, is it Philip Morris policy to try to design
4 its advertising campaigns so as not to appeal to
5 those under 21?

6 A. We certainly don't design our advertising
7 campaigns to appeal to underage smokers. We consider
8 adult smokers, which are 18 years of age and above,
9 as legal-age smokers, and if there is appeal of our
10 product to a legal-age smoker, we don't see anything
11 wrong with that. That is perfectly acceptable.

12 What we don't do is try to appeal to underage
13 smokers or underage people.

14 Q. You agree that if you design an advertising
15 campaign to appeal to somebody who's 21 or older,
16 that it might also appeal to somebody who's 20;
17 right?

18 A. Yes, and it might appeal to somebody, as you
19 said before, 19 or 18.

20 Q. Right. But if you design it to appeal to
21 somebody who's 21 or older, it is less likely to
22 appeal to a 15- or 16-year-old than if you design it
23 to appeal to an 18-year-old; correct?

24 MR. HOWARD: Objection.

25 A. I -- I think you're -- you're cutting the loaf

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1 very thin. I mean, you -- you may be right. I'm not
2 sure that it falls quite so precisely into the
3 categories that you're outlining.

4 I think my response to you would be that we do
5 not design advertising nor do we want our advertising
6 to appeal to anyone who is underage, nor do we
7 execute our marketing programs or our advertising in
8 a way that, one, it -- we don't want it to appeal to
9 them; two, we -- we really don't want to put it in
10 front of them. We're not interested in attracting
11 them. We're not interested in communicating with
12 them. We're not interested in having them see our
13 advertising because we don't want them to smoke, we
14 don't want them to buy our product, and we don't want
15 to reach them in any way. On the contrary, we want
16 to deny them access.

17 So we would not design anything that was
18 intended for an -- an underage market. Now whether
19 that's 18, 19, 20, 21 or 25, in what the primary
20 appeal of the advertising is I think is irrelevant.
21 The important thing is that we don't design it to
22 appeal to an underage audience.

23 Q. Okay. My question, though, is whether it is
24 Philip Morris policy to attempt in its advertising
25 campaigns to build in a -- that cushion that we

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1 talked about earlier by -- by designing its
2 advertising to appeal to those 21 and older.

3 A. I don't believe you can build the cushion into
4 the ad. I think you can build the cushion into where
5 you run the ad and how you run and implement your
6 programs that take their imagery from the ad. So I
7 don't think the cushion gets built into the ad. I
8 think the cushion gets built into the execution and
9 the practices.

10 Q. So there is no Philip Morris policy to attempt
11 to design advertising campaigns to appeal to only
12 those 21 and over?

13 MR. HOWARD: Objection.

14 A. There is a real effort on behalf of Philip
15 Morris in its advertising to design advertising that
16 will appeal only to adults.

17 Q. And by "adults" now for this purpose, Philip
18 Morris is defining that as 18 and older?

19 A. That's correct.

20 Q. How does one design an ad to appeal to somebody
21 who is 18 but not to somebody who is 17?

22 A. I -- I don't know that you do, and I think
23 that's where we're having a semantic difference
24 here. I don't think you design an ad to appeal to an
25 18, 19 or -- you design a campaign that has broad

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1 appeal, and our advertising campaigns have had broad
2 appeal among adult smokers of many ages, from 18 to
3 55 to 60. We have had campaigns that have had that
4 appeal.

5 The issue is how have we implemented our program
6 and who have we tried to attract with our advertising
7 and our promotional programs, and there I would
8 submit that we are very careful to build that cushion
9 in to make sure that we're not reaching that person
10 that you were talking about that's 17 years and 11
11 months old as opposed to the one that is 18 years and
12 1 month old. So that's how we address advertising
13 and promotion.

14 Q. Is it your testimony that Philip Morris's
15 advertising is designed to universally appeal to
16 every adult smoker as opposed to targeting segments
17 of the -- the adult smoking population?

18 A. I -- it is my testimony that our advertising is
19 designed to -- not to -- for every campaign to appeal
20 to every adult smoker, but certainly designed to
21 appeal to the adult smoker who makes a certain type
22 of product choice; in the case of Marlboro, someone
23 who wants a flavorful, quality, cork-tipped,
24 stronger, more satisfying cigarette; in the case of
25 Merit, the smoker who chooses a lighter, low-tar

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1 cigarette.

2 So it's a matter of the product positioning and
3 then creating ad -- advertising that will have appeal
4 and communicating that to the -- the person who makes
5 that product choice.

6 Q. Your --

7 You used four phrases to refer to Marlboro:
8 Flavorful, quality, cork tipped, stronger, more
9 satisfying. Maybe that's five.

10 A. Uh-huh.

11 Q. And you would --

12 You would consider those product attributes;
13 right?

14 A. I would.

15 Q. Okay. And it's your testimony that Philip
16 Morris's advertising is intended to emphasize the
17 product attributes; right?

18 A. I -- yes, it is.

19 Q. Okay. How does a picture of a cowboy with the
20 word "Marlboro" convey anything about the flavor, the
21 quality, the cork-tipped aspect of -- of the
22 Marlboro, that it's stronger or more satisfying?

23 A. Oh, I think the -- the positioning of the brand,
24 the use of the western scenery, Marlboro country, the
25 cowboy and what he stands for, the fact that we show

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1 the product in the ad with the flip-top box open and
2 the cork tip coming out of the pack, the red tones in
3 the ad all I think reinforce the product message and
4 the product positioning of Marlboro.

5 If you looked at a Merit ad, you would see, you
6 know, softer blue tones, more copy, a different kind
7 of a positioning that I think would appeal to an
8 audience that is looking for a different kind of
9 cigarette.

10 Q. I'm talking about the Marlboro ads where there's
11 no picture of any cigarettes or any cigarette box,
12 just the word "Marlboro" and a -- and a picture of a
13 cowboy.

14 A. Oh, yes, but, you know, Marlboro advertising has
15 been running for many, many years, and you're --
16 you're saying there might be one ad where there's
17 just the word "Marlboro" and the cowboy, but there
18 are any number of other ads in the course of the year
19 or the years where the product has been shown in the
20 cowboy's hand or in the box or where you would see
21 the cork tip in the product, et cetera, so it's --

22 Q. It's Philip Morris's --

23 A. -- part of the campaign.

24 Q. I'm sorry.

25 It's Philip Morris's position that increases in

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1 taxes do not decrease the number of youths taking up
2 smoking; correct?

3 MR. HOWARD: Objection. Could I just have
4 that read back or take a look at it for a moment.

5 Do you need that read back?

6 THE WITNESS: Yeah.

7 MR. HOWARD: I object.

8 Q. It's Philip Morris's position that increases in
9 taxes do not decrease the number of youths taking up
10 smoking; correct?

11 MR. HOWARD: This is -- go ahead if you
12 know.

13 A. I -- I don't know if it would decrease the
14 number of youths that smoke or not smoke, but it
15 certainly is Philip Morris's position that excise
16 taxes are regressive and single out one group of
17 smokers to be penalized and to be overtaxed and --
18 and we think they're unfair. So I think -- I think
19 there are many ways to ensure that young people don't
20 smoke, and denying them access is probably much more
21 effective than raising the price and -- and -- and
22 imposing an excise tax on all smokers.

23 Q. My question is specifically whether it is Philip
24 Morris's position that it has been proven that
25 raising cigarette taxes does not deter anyone,

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1 including underage smokers, from smoking.

2 A. I -- I don't know how to answer that question.

3 I don't know if it's -- if we have a position. I can
4 tell you what our position is on excise taxes and how
5 we feel about them, and obviously we think that
6 they're unfair and that it is not an effective way to
7 impact the issue of youth smoking.

8 Q. I'm going to show you what's been previously
9 marked as Plaintiffs' Exhibit 271.

10 MR. GORDON: I apologize, I only have one
11 copy. If you need another one, we can get the court
12 reporter's copy. Do you need another one?

13 MR. HOWARD: No, thank you.

14 MR. GORDON: Okay.

15 Q. This is a --

16 A. Uh-huh.

17 Q. -- three-page document produced by Philip Morris
18 bearing Bates stamp number 2046573757 through 3759.

19 Have you seen this document before?

20 A. Yes, I have.

21 Q. Okay. In fact, did you draft this or have a
22 role in its drafting?

23 A. I certainly saw it when it was drafted. I -- I
24 did not draft it.

25 Q. And this was a document that was intended for

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1 public dissemination; correct?

2 A. This is a core message -- message track that is
3 made basically for internal use, to -- to out --
4 outline messages that we would deliver, not
5 necessarily be sent to anybody.

6 Q. When you say for messages to deliver, you mean
7 this is the -- essentially the briefing --

8 A. That's correct.

9 Q. -- material for Philip Morris people so that
10 they know what the Philip Morris position is when
11 they speak publicly?

12 A. That's -- that's correct.

13 Q. Okay. And I want to direct your attention to
14 the second page, the second bullet point on the -- on
15 the page in the middle where it says, quote, "It has
16 been proven that raising cigarette taxes does not
17 deter anyone - including underage smokers - from
18 smoking because smokers will find other ways to buy
19 their cigarettes for less money such as crossing
20 national/state" bound -- "and local borders for lower
21 taxes and buying cigarettes from Indian reservations,
22 military bases and bootleggers." Do you see that?

23 A. Yes, I do.

24 Q. Okay. Does that refresh your recollection as to
25 whether it's the official Philip Morris position that

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1 raising cigarette taxes does not deter underage
2 smokers from smoking?

3 MR. HOWARD: I'm going to make an objection
4 as to form.

5 A. Again I don't believe that that's what this
6 document says. I think this document comes much
7 closer to saying what I said before, which is that we
8 think that cigarette taxes, excise taxes, are
9 punitive and we do believe that they are a form of
10 social engineering and that overall they are not a
11 deterrent. They -- they only serve to put a burden
12 on a group of people who choose to smoke, and
13 therefore on that basis we fight them.

14 But I don't -- I don't see that we say -- we say
15 it's an inappropriate way, and that -- I think that's
16 what I answered your question with before.

17 Q. In fact, internally Philip Morris acknowledges
18 that a -- that when you raise excise taxes, it
19 reduces teenage smoking; correct?

20 MR. HOWARD: Objection, lack of
21 foundation.

22 A. I don't know that we think it will or it won't.
23 We think that excise taxes are a regressive and
24 unfair form of taxation.

25 Q. Okay. My question is whether Philip Morris

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1 internally acknowledges that raising excise taxes
2 decreases teenage smoking, and your -- your
3 testimony -- I want to make it clear. Your testimony
4 is you don't know what Philip Morris's internal
5 position is?

6 A. I don't know that we have that position. I can
7 tell you we -- what we do believe will reduce teenage
8 smoking, and that is denying them access to the
9 product, --

10 Q. Okay.

11 A. -- education, community involvement, law
12 enforcement, any number of things that don't involve
13 social engineering.

14 Q. Thank you. I move to strike as nonresponsive.

15 I'm going to show you what's been marked as
16 Exhibit 356. This is a document produced by Philip
17 Morris bearing Bates stamp number 2045259412 through
18 9415, a mem -- interoffice correspondence dated
19 September 17, 1981 from Myron Johnston to Harry
20 Daniel entitled "Teenage Smoking and the Federal
21 Excise Tax on Cigarettes," and it is marked
22 "CONFIDENTIAL: MINNESOTA TOBACCO LITIGATION."

23 A. Uh-huh.

24 Q. Okay. And I want to direct your attention to
25 page three of this document and the last paragraph on

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1 page three where it says, quote, "In any event, and
2 for whatever reason, it is clear that price has a
3 pronounced effect on the smoking prevalence of
4 teenagers, and that the goals of reducing teenage
5 smoking and balancing the budget would both be served
6 by increasing the Federal excise tax on cigarettes."

7 Do you see that?

8 A. Yes, I do.

9 Q. Okay. And I want to turn your -- direct your
10 attention to the next page, page four, very last
11 paragraph in the middle where it says, quote, "Given
12 a price elasticity of minus 0.4 for total cigarette
13 sales and minus 1.2 for teenage smoking
14 participation, a 25 percent increase in the excise
15 tax could be expected to reduce industry sales to
16 about 1.2 percent below what would be expected in the
17 absence of such an increase, and to reduce the number
18 of teenage smokers to 3.5 to 4 percent below the
19 number that would otherwise be expected." Do you see
20 that?

21 A. I do.

22 Q. Is this the first time you've seen this document
23 or heard the information that I've just read to you?

24 MR. HOWARD: Objection, compound.

25 A. I believe I have seen this document.

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1 Q. Now I'd like to show you what's been previously
2 marked as Plaintiffs' Exhibit 688. This is a
3 document bearing -- produced by Philip Morris bearing
4 Bates stamp number 2022216179 through 6180, an
5 interoffice correspondence dated September 3rd, 1987
6 from Myron Johnston to Jon Zoler entitled "Handling
7 an excise tax increase."

8 And I want to direct your attention --

9 MR. GORDON: Did I give the Bates numbers
10 on that?

11 THE REPORTER: Yes.

12 MR. GORDON: Okay.

13 Q. I just want to direct your attention to the
14 second paragraph where it says, quote, "You may
15 recall from the article I sent you that Jeffrey
16 Harris of MIT calculated, on the basis of the Lewin
17 and Coate data, ... the 1982-83 round of price
18 increases caused two million adults to quit smoking
19 and prevented 600,000 teenagers from starting to
20 smoke. Those teenagers are now 18 to 21 years old,
21 and since about 70 percent of 18 to 21 year-olds and
22 35 percent of older smokers smoke a PM brand, this
23 means that 700,000 of those adult quitters had been
24 PM smokers and 420,000 of the non-starters would have
25 been PM smokers. Thus, if Harris is right, we were

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1 hit disproportionately hard. We don't need to have"
2 this "happen again."

3 Do you see that?

4 A. I do.

5 Q. Is this the first time you've seen this
6 document?

7 A. Yes, I think it is. I don't recall this
8 document at all.

9 Q. So have you ever heard anyone discussing the
10 impact that excise tax increases have in terms of
11 Philip Morris's share of starters?

12 A. I -- I have -- no, I have not heard anyone
13 internally have this kind of a discussion at all.

14 Q. And this is the first time that you've ever seen
15 anyone attempt to calculate the number of smoker --
16 would-be smokers that Philip Morris lost because of
17 an excise tax increase; --

18 MR. HOWARD: Objection.

19 Q. -- correct?

20 A. It is the first time that I have seen
21 information about the number of teenage smokers that
22 we have lost because of an excise tax.

23 Q. And Philip Morris has never publicly taken the
24 position that an increase in the federal excise tax
25 would reduce teenage smoking initiation; correct?

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1 A. Not to -- not to my knowledge and not since I've
2 been involved in dealing with the issue of excise
3 taxes.

4 Q. Okay. Philip Morris --

5 Philip Morris believes that it's -- that it is
6 important to know as much as possible about teenage
7 smoking patterns and attitudes; correct?

8 MR. HOWARD: Objection.

9 A. Can you define for me "teenage."

10 Q. Well how do you define "teenage"?

11 A. Well "teenage" can start with the age of 13, or
12 we could be talking about smokers, which is what
13 Philip Morris is interested in, adult smokers, so
14 then we'd be talking about 18- and 19-year-olds. And
15 yes, we're interested in 18- and 19-year-olds. No,
16 we're not interested in 13- through 18-year-olds.

17 Q. How about 15-, 16- and 17-year-olds?

18 A. Not -- not -- no, we are not interested in them
19 as a market or as smokers except to hope that they
20 would not and that they would stop and that we could
21 develop some programs to get them to stop if they
22 are.

23 Q. So Philip Morris is not interested in teenage
24 smoking patterns for teenagers under 18?

25 A. Not for marketing purposes, no, not at all.

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1 Q. Okay. And you're not interested even though
2 today's teenager is tomorrow's regular customer; is
3 that right?

4 A. Not from the standpoint of marketing to them.
5 Obviously as any company we might be interested in
6 demographic patterns, what the population base looks
7 like for projections, business projections,
8 et cetera, but from the standpoint of having
9 information to market to anyone under the legal age
10 to smoke, we are absolutely not interested.

11 Q. Okay. The smoking patterns of teenagers are
12 particularly important to Philip Morris, are they
13 not?

14 MR. HOWARD: Objection.

15 A. Could you again define what -- what group you're
16 talking about.

17 Q. 15- -- let's say 15- to 19-year-olds.

18 MR. HOWARD: Then I object because you're
19 packaging legal smokers together with minors.

20 A. I will again answer as I did before. Philip
21 Morris is very interested in 18- to 21-year-olds and
22 21- to 25-year-olds and 25- to 35-year-olds,
23 et cetera. We are not interested in underage smokers
24 except from the standpoint of how we can develop
25 programs to ensure that we deny them access.

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1 Q. I'm going to show you what's been previously
2 marked as Exhibit 358, a document produced by Philip
3 Morris bearing Bates stamp number 1003636640 through
4 6688, a Philip Morris USA Research Center document
5 entitled "Young Smokers, Prevalence, Trends,
6 Implications and Related Demographic Trends," written
7 by Myron Johnston, dated March 31, 1981.

8 A. Uh-huh.

9 Q. Okay. And I direct your attention to the
10 summary page, which is page three.

11 A. I see it.

12 Q. The very first line, quote, "It is important to
13 know as much as possible about teenage smoking
14 patterns and attitudes. Today's teenager is
15 tomorrow's potential regular customer, and the
16 overwhelming majority of smokers first begin to smoke
17 while still in their teens." Do you see that?

18 A. I do.

19 Q. Do you agree with all that?

20 A. I don't.

21 Q. Why not?

22 A. Because I think that we would only be interested
23 in, as I say, patterns of -- of demographics from the
24 standpoint of projecting what a potential audience
25 might look like, what size it would be, what the

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1 demographic patterns are going to be, not smoking
2 behavior of underage people because we're not
3 interested in marketing to them or knowing what their
4 choices are. Our interest in underage people is to
5 get them not to smoke.

6 Q. So Philip Morris has no interest in knowing what
7 the choice of 15- and 16- and 17-year-old smokers is
8 when they choose to smoke?

9 A. Not -- not to my knowledge and not -- not in
10 anything that I've been involved in -- in doing for
11 Philip Morris.

12 Q. Well I want to --

13 I want you to go beyond your personal experience
14 and tell me what Philip Morris's position is.

15 A. Well I can tell you --

16 Q. Does -- is it --

17 Is it your testimony as the spokesperson for
18 Philip Morris that Philip Morris has no interest in
19 knowing what 15-, 16- and 17-year-olds are smoking?

20 MR. HOWARD: Objection, asked and
21 answered. You may answer again.

22 A. That is correct.

23 Q. Okay. And Philip Morris has no interest in
24 knowing anything about the smoking patterns or
25 prevalence of those under 18; is that correct?

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1 MR. HOWARD: Objection, asked and
2 answered.

3 A. Our interest in knowing anything about what is
4 happening with the youth market is only to ensure
5 that we support the appropriate programs to deny them
6 access to our products, and beyond that our focus is
7 on 18-year-olds and older from the standpoint of
8 marketing our cigarettes.

9 MR. NUNLEY: Mr. Gordon, the next witness
10 just called and wondered timing. Do you have any
11 idea? Should I tell him to come at 4:00, 4:30?

12 MR. GORDON: Let's say 4:15.

13 Q. Have you ever heard of the Opinion Research
14 Corporation?

15 A. I may have.

16 Q. I'll show you what's been previously marked as
17 Exhibit 350, a document produced by Philip Morris
18 bearing Bates stamp number 2022240887, a document on
19 the letterhead of Opinion Research Corporation dated
20 December 21st, 1961 to Dr. W. L. Dunn, Jr. --

21 A. Uh-huh.

22 Q. -- from apparently Shoi Dickinson.

23 A. That's what it looks like, yes.

24 Q. Does that refresh your recollection as to
25 something called the Opinion Research Corporation?

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1 A. I don't believe I've -- I've ever seen this and
2 this is not a company that I am aware of that we're
3 working with or have worked with since I've been
4 involved with Philip Morris, but I -- I may have
5 heard of them.

6 Q. Okay. And in this document they're talking
7 about offering a new research service -- service
8 studying the teenage market; correct?

9 A. That's what the document says.

10 Q. Okay. And in fact, Philip Morris has hired
11 Opinion Research Corporation on several occasions to
12 perform studies of the teenage market; correct?

13 MR. HOWARD: Objection, no foundation.

14 A. Again I -- I don't see any age stipulation in
15 this document, so I'm not sure what the project was
16 about.

17 Q. Okay.

18 A. And obviously I wasn't with Philip Morris at the
19 time.

20 Q. So whether or not Philip Morris ever hired
21 Opinion Research Corporation to -- to do studies of
22 the teenage market, you don't know?

23 A. I don't know.

24 Q. Okay. I'll show you what's been marked as
25 Exhibit 361, a document bearing Bates stamp number

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1 1000338644 through 38671 entitled "Special Report
2 Number 248: MARKET POTENTIAL OF A HEALTH
3 CIGARETTE." And I just want to direct your attention
4 to page 12.

5 MR. HOWARD: Let me just tell the witness
6 that you should feel free to read as much of this
7 document as you feel you need to to put any questions
8 into context.

9 A. Page 12?

10 Q. Yeah, on page 12 in the middle of the middle
11 paragraph, the sentence that says "This tendency for
12 young smokers to select a brand to be like their
13 friends was also noted in a November 1961 study done
14 for us by Opinion Research Corporation." Do you see
15 that?

16 A. Yes, I do.

17 Q. Okay. Were you aware of a 1961 study done for
18 Philip Morris by Opinion Research Corporation?

19 A. No, I was not.

20 Q. Okay. Have you heard --

21 MR. HOWARD: To clarify, you were asking
22 about a November 1961 study in that last question, --

23 MR. GORDON: Right.

24 MR. HOWARD: -- Mr. Gordon?

25 MR. GORDON: Right.

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1 Q. Are you aware of any study done by Opinion
2 Research Corporation?

3 A. No, I am not.

4 MR. HOWARD: I just think it's disingenuous
5 to put that question in front of her asking about
6 November having previously shown a proposal in
7 December of 1961 and suggest they're connected.

8 MR. GORDON: Speaking objections are not
9 permitted under the case management order,
10 Mr. Howard.

11 MR. HOWARD: I'm trying to clarify as an
12 officer of the court a --

13 MR. GORDON: No.

14 MR. HOWARD: -- misrepresentation I believe
15 you made on the record. There was no question
16 pending. It wasn't a speaking objection to prompt
17 the witness or anything else. I was just --

18 MR. GORDON: Mr. Howard, you're entitled to
19 make an objection to the form of the question or
20 instruct to answer or not for privilege. You are not
21 entitled to make those kind of speeches, and if you
22 persist in doing it, we're going to -- we're going to
23 call the court. That is absolutely not permitted
24 under the court's order.

25 You have -- you have an opportunity -- you will

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1 have an opportunity to conduct a direct examination
2 of this witness, and any questioning you feel that is
3 unfair, you can clarify it and ask what you consider
4 to be fair questions, but you do not have the right
5 to comment on my questioning and what you consider to
6 be unfairness. If you want to object to the form of
7 my questions, you go ahead. If you believe a
8 question calls for privilege, you instruct not to
9 answer; otherwise, you follow the case management
10 order.

11 BY MR. GORDON:

12 Q. I want to show you what's been marked as
13 Exhibit 680.

14 MR. NUNLEY: Don't worry. They didn't
15 follow it when defending our depositions.

16 Q. You ever heard of Gilbert Youth Research? I'll
17 back up. Let me note this for the record.

18 I'm showing you what's been marked as
19 Exhibit 680, a document bearing Bates stamp number
20 1005040495 through 515, a document produced by Philip
21 Morris entitled "TEEN-AGE CIGARETTE PURCHASING AND
22 SMOKING HABITS IN THE U.S.A., 1963."

23 You ever heard of Gilbert Youth Research?

24 A. No, I have not.

25 Q. Okay. I direct your attention to what is page

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1 three of this document, but it's -- the Bates number
2 ends in 499.

3 A. I see it.

4 Q. Okay. And the three -- the --

5 Do you see where under "OBJECTIVES OF THE STUDY"
6 it says "To determine the extent of smoking among
7 young people 13 through 18 years old"? Do you see
8 that?

9 A. I do.

10 Q. Okay. Is this the first time you've seen this
11 Gilbert Youth Research --

12 A. Yes.

13 Q. -- study?

14 MR. HOWARD: I'd like to give the witness
15 the opportunity to review the entire document and not
16 just the portion to which she's been directed.

17 MR. GORDON: Sure.

18 Q. Do you want to do that?

19 A. Yes.

20 (Witness reviews Plaintiffs' Exhibit 680.)

21 A. It's a little difficult to read.

22 MR. NUNLEY: While the witness is reviewing
23 this, could we -- can I ask for just the approximate
24 running time?

25 THE VIDEOGRAPHER: I'll give it to you in

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1 about five minutes.

2 MR. NUNLEY: Okay. That's fine. No
3 problem.

4 A. I've never seen this document before.

5 Q. Any idea how it found its way into Philip
6 Morris's files?

7 A. How it found its way? I don't know. I mean, I
8 wasn't -- I didn't work for Philip Morris in 1963,
9 and to me, it looks like -- you know what? I think I
10 have actually seen this document now that I look at
11 it more closely. This -- and read the -- the
12 addressee on -- on the -- on the letter. This was
13 obviously directed to Louis Risman, who is president
14 of the National Automatic Merchandising Association,
15 which would have been a vendor, a vending machine
16 operator, and obviously this study was something that
17 was done, I would assume, for the vending community,
18 and someone must have sent it to us.

19 Q. Do you know if Philip Morris did anything to
20 assist the National Automatic Merchandising
21 Association with respect to its study?

22 A. I -- I would not know the answer to that, --

23 Q. Okay.

24 A. -- 1963.

25 MR. GORDON: Could I have the court

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1 reporter mark this, please.

2 THE REPORTER: Off the record, please, to
3 change tape.

4 (Discussion off the record.)

5 (Plaintiffs' Exhibit 1306 was marked
6 for identification.)

7 BY MR. GORDON:

8 Q. Showing you Exhibit 1306, a document produced by
9 Philip Morris bearing Bates stamp number 1005040524,
10 a letter on the National Automatic Merchandising
11 Association letterhead to James Boling at Philip
12 Morris Incorporated dated March 21, 1963, do you see
13 this?

14 A. I do.

15 Q. And in this the director of statistics, research
16 and marketing for the National Association --
17 Automatic Merchandising Association is writing to Jim
18 Boling about a luncheon discussion. Do you see
19 that?

20 A. I can -- yeah, I can just about make that out.

21 Q. And he's asking for a member of the Philip
22 Morris market research department to sit in on an
23 upcoming meeting?

24 A. Counsel, I'm really -- I'm sorry, I'm having a
25 real problem reading this, but --

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1 Q. In that first paragraph do you see "Per our
2 luncheon discussion, I am looking forward to our 2:30
3 p.m. meeting on Tuesday, and hope that it will be
4 possible to have a member of your market research
5 department" --

6 A. Yes, I see that.

7 Q. -- "sit in"?

8 Okay. And it discusses his threefold interest:
9 Number one, "To verify that I have uncovered all the
10 literature on young people"; two, "To discuss the
11 merits of the various outside survey firms"; and
12 three, "To discover whether the activities of my new
13 department can be useful to you." Do you see that?

14 A. I do.

15 Q. Okay. And this is dated --

16 A. March 21st, 1963.

17 Q. Right. A little less than five months before
18 the Gilbert Youth Research survey is sent to the
19 National Automatic Merchandising Association?

20 MR. HOWARD: I object to this question.

21 A. I see that.

22 Q. Do you have any knowledge of whether Philip
23 Morris provided the assistance that the National
24 Automatic Merchandising Association was asking for?

25 MR. HOWARD: Objection as to form.

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1 A. No, I -- I really would not have any knowledge
2 of that.

3 Q. Okay. You're familiar with the Philip Morris
4 POL National Roster, are you not?

5 A. I'm familiar, yes, with the fact that we do a
6 POL, yes.

7 Q. And what does that stand for?

8 A. That's -- I don't know. I don't know what the
9 actual letters stand for.

10 Q. Have you ever heard the phrase "Product Opinion
11 Laboratory"?

12 A. That's right. I know it's -- I thought it's
13 testing, but I didn't know what the actual letters
14 stand for.

15 Q. It's a marketing research?

16 A. Right, right.

17 Q. And it's owned by Philip Morris; right?

18 A. To my knowledge, it is, yes.

19 Q. Okay. And Philip Morris recruits people to be
20 on its panel and to periodically respond to surveys;
21 correct?

22 A. That's my understanding.

23 Q. Okay. And I'm going to show you what's been
24 marked as Exhibit 146, a document bearing Bates stamp
25 number 1000306237 through 6239, a document produced

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1 by Philip Morris dated May 23rd, 1969 from M. E.
2 Johnston to Dr. R. B. Seligman, and the subject is
3 "Marlboro Market Penetration by Age and Sex."
4 A. Uh-huh.
5 Q. Okay. And do you see that this document is
6 summarizing data for the first quarter of 1968 based
7 on the POL National Roster? Right?
8 A. Yes.
9 Q. So this is summarizing data as to Marlboro's
10 market penetration based on Marlboro's -- or excuse
11 me, based on Philip Morris's own marketing research
12 company; right?
13 A. It appears to.
14 Q. Take a -- turn to page seven, if you would. Or
15 strike that. The second page.
16 What's the first age that is shown there on this
17 graph?
18 MR. HOWARD: Object to this question. This
19 thing is hardly legible.
20 A. I'm not sure where I'm supposed to see an age.
21 Q. If you look on the lower part of this graph, you
22 see it says "SINGLE YEARS OF AGE." Do you see that?
23 A. Yes, down here at the bottom.
24 Q. Okay. What's the lowest age?
25 MR. HOWARD: Objection.

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- 1 A. I -- I think it's 15. It looks like it's 15.
- 2 Q. Okay. And do you see the percent along that
- 3 left-hand column?
- 4 A. Not legible on my copy.
- 5 Q. Well can you see the line that's marked -- you
- 6 can't see the word "PERCENT" in the upper left-hand
- 7 corner?
- 8 A. I see the word "PERCENT," but I can't -- I --
- 9 except for the -- the three at the very top, nothing
- 10 else is legible.
- 11 Q. You can't read the 30 and the 25?
- 12 A. 30 and twenty -- no.
- 13 Q. I wonder if you have a worse copy than I do.
- 14 A. I can't.
- 15 Q. That doesn't look like a 25 to you?
- 16 A. It didn't.
- 17 MR. HOWARD: Objection.
- 18 A. It did -- really did not.
- 19 Q. Okay. And do you see the two lines that follow
- 20 first a little bit up and then basically trend
- 21 downward?
- 22 A. Yeah.
- 23 Q. Okay. And one of --
- 24 One of those lines is apparently for male and
- 25 one is for female; correct?

1 MR. HOWARD: Object, lack of foundation for
2 these questions.

3 A. I have -- I really have no idea. I mean,
4 it's -- this is an impossible document to read. I
5 don't know what its significance is, and I don't know
6 what this chart is telling me.

7 Q. Well the fact of the matter is the significance
8 is that your own Product Opinion Laboratory was
9 doing -- was conducting surveys to determine
10 Marlboro's market penetration with 15-, 16- and
11 17-year-olds; right?

12 MR. HOWARD: Objection, lack of
13 foundation.

14 A. I don't know that for a fact. I mean, perhaps,
15 but I don't -- I don't know that for a fact.

16 Q. Would it surprise you if that was the fact?

17 A. Would it surprise me? It -- it might, yes. I
18 mean, I -- I know that our research is limited and
19 has been for all the years that I've been involved to
20 people 18 years of age and older, and I would be
21 surprised that we were testing anyone younger.

22 Q. Would it disturb you?

23 A. Yes, it would quite frankly.

24 MR. GORDON: Can I have that marked,
25 please.

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1 (Plaintiffs' Exhibit 1307 was marked
2 for identification.)

3 (Discussion off the stenographic record.)

4 BY MR. GORDON:

5 Q. Showing you Exhibit 1307, a document produced by
6 Philip Morris bearing -- bearing Bates stamp number
7 2023066583 through 6592, a document dated
8 December 16, 1968 from Myron Johnston to Dr. R. B.
9 Seligman entitled "Cigarette Smoking Patterns from
10 the POL National Roster," have you seen this document
11 before?

12 A. I'd have to go through more of the document to
13 know if I had or not.

14 MR. HOWARD: Why don't you take your time
15 and do that.

16 (Witness reviews Plaintiffs'
17 Exhibit 1307.)

18 A. I don't believe I've seen this document before.

19 Q. You would agree that this is a summary of Philip
20 Morris's own POL participants; correct?

21 MR. HOWARD: Objection, lack of
22 foundation.

23 A. It -- it could be. I -- as I say, I have not
24 seen this document before.

25 Q. Okay. And if you turn to the fourth page of the

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1 document where it says "TABLE 1, TYPE OF CIGARETTE
2 SMOKED BY AGE," do you see that?

3 A. Yes, I do.

4 Q. Okay. What's the first age-group in the male
5 category?

6 A. Under 18.

7 Q. And how about the female category? What's the
8 first age-group?

9 A. Under 18.

10 Q. Okay. And it summarizes data for both males and
11 females under 18; correct?

12 A. It appears to, yes.

13 MR. HOWARD: Objection, lack of
14 foundation. Go ahead.

15 A. It appears to.

16 Q. And that's from Philip Morris's own Product
17 Opinion Laboratory; right?

18 MR. HOWARD: Objection, lack of
19 foundation.

20 A. It appears to be.

21 Q. Yeah. I'd like to show you what's been marked
22 as Exhibit 147, a document produced by Philip Morris
23 bearing Bates stamp number 1000719422 through 19423,
24 a letter dated January 4, 1971 from H. Wakeham, Vice
25 President, Corporate Research and Development, to

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1 Dr. Paul F. Lazarsfeld, Department of Sociology,
2 Columbia University, New York.

3 In particular I want to direct your attention to
4 the first paragraph.

5 (Witness reviews Plaintiffs' Exhibit 147.)

6 Q. This is an agreement on the part of Philip
7 Morris to fund a study by Dr. Lazarsfeld of several
8 groups, including adolescents and the parents of
9 adolescents, where the main purpose is to investigate
10 the motivational conflicts engendered by the ongoing
11 discussion about cigarette smoking; correct?

12 A. Correct.

13 Q. Do you know why Philip Morris was willing to --
14 to fund research into the motivational conflicts
15 engendered by the ongoing discussion about cigarette
16 smoking involving interviews with adolescents?

17 A. Well I -- I don't know because I've not -- never
18 seen this document before and I was not a party to
19 this study, but the fact that they're talking to
20 adolescents and their parents certainly was
21 consistent with our being involved in developing
22 programs adhering to the Advertising Code,
23 et cetera. I mean, I don't see this as a document or
24 a study that would have been used in any way to
25 market our products, and I think that's really the

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1 basis of what we're talking about here, what our
2 marketing practices were and are and what information
3 we were gathering to market our product, and we
4 certainly were not using information about young
5 people to market.

6 Q. It was just academic curiosity?

7 MR. HOWARD: Objection.

8 A. I don't know what it was because, as I said,
9 I -- I had never seen this before and I was not a
10 party to this study, so I don't know why it was
11 called for. But it certainly was not to use as a
12 marketing instrument.

13 Q. Well how do you know if you don't know anything
14 about the study?

15 A. Well because I know in 1971 I was with Philip
16 Morris already and I know that -- what our practices
17 were and I know how we conducted our business and I
18 know why I've always been proud to work for the
19 company, because of the way we have conducted our
20 business and because of our policies and practices.

21 Q. But you know nothing about this study or why it
22 was commissioned.

23 A. I do not. I've -- I've never seen this before.

24 Q. And you know nothing about how any information
25 from this study might have been used by others at the

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1 company; right?

2 A. No, with certainty, I don't. I only know what
3 the company position was, what I interpreted and how
4 I interpreted that position and how I and my
5 colleagues did our business.

6 Q. I'd like to show you what's been marked as
7 Exhibit 681, a document produced by Philip Morris
8 bearing Bates stamp number 2041761791, a document
9 dated May 18, 1973 from marketing research
10 department, "Subject: Incidence of Smoking
11 Cigarettes."

12 Let me direct your attention, first of all, to
13 the list of people to whom this --

14 A. Uh-huh.

15 Q. -- document went. You're one of the people;
16 right?

17 A. Yes, I am.

18 Q. Okay. And this discusses a March 1973 Opinion
19 Research Corporation national probability sample;
20 right?

21 A. That's what it is, yes.

22 Q. Okay. And the --

23 What's the age-group shown in the incidence
24 overall and by sex on that bottom line?

25 A. 12 to 17.

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1 Q. Uh-huh. And what is the incidence percentage
2 for males 12 to 17?

3 A. Average consumption -- well 13 -- 13 percent.

4 Q. Well isn't that the total?

5 A. Oh, males, sorry, 14 percent.

6 Q. So 14 percent of males 12 to 17 were smoking and
7 13 percent of females 12 to 17 were smoking according
8 to this report; right?

9 A. That's --

10 MR. HOWARD: Objection, --

11 Q. And this --

12 MR. HOWARD: -- mischaracterization.

13 Q. This document was marked "CONFIDENTIAL"; right?

14 A. It is.

15 Q. Okay. This is --

16 MR. HOWARD: Objection.

17 Q. This is not a public document, is it?

18 A. I don't see --

19 MR. HOWARD: Objection.

20 A. -- where it's marked "CONFIDENTIAL."

21 Q. Along the side.

22 A. Oh.

23 MR. HOWARD: Objection.

24 A. There is a stamp that says "CONFIDENTIAL:

25 MINNESOTA TOBACCO LITIGATION."

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1 Q. Yeah. Well this -- this wasn't a public
2 document. This wasn't published some -- in -- in a
3 magazine or a newspaper, was it?

4 MR. HOWARD: Objection, lack of
5 foundation.

6 A. Not to my knowledge.

7 Q. So in March 1970 -- or excuse me.

8 In May 1973 when you got a copy of this
9 document, what did you understand was the purpose of
10 Opinion Research Corporation's national probability
11 sample of incidence of smoking for 12- to
12 17-year-olds?

13 A. I -- I -- I can't tell you what I -- what I
14 thought at the time. All I can tell you is that
15 again I understood what our marketing practices
16 were. I understood what our policies were, and it --
17 it was not information that we used in any way to put
18 together marketing programs.

19 Q. Does this, by the way, reflect -- refresh your
20 recollection as to whether you'd ever heard of
21 Opinion Research Corporation before today?

22 A. I -- I -- I -- I said even when you asked me
23 that I thought I may have heard of them. I had never
24 seen that document. I was not aware of the study
25 having been commissioned, but I thought I'd heard of

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1 the company, and obviously I did hear of the
2 company.

3 Q. Do you remember being concerned in 1973 to learn
4 that 13 percent of 12- to 17-year-olds were smoking?

5 A. I -- I can't tell you with any honesty what I
6 was thinking in 1973. I don't remember my reaction
7 to this particular document.

8 Q. Does it bother you today that Philip Morris was
9 studying this issue?

10 A. I -- I would prefer that we did -- did not even
11 look at the incidence, but the fact is I am confident
12 in 28 years of being with Philip Morris that we have
13 acted responsibly in the way we have conducted
14 ourselves in our marketing practices and our
15 commitment to not market to youth and in fact to
16 continually develop more and more effective proactive
17 programs to deal with the issue of youth smoking. So
18 that would be my answer to that.

19 Q. You've heard of the Roper Organization, haven't
20 you?

21 A. I have.

22 Q. It's done marketing research for Philip Morris
23 on a number of occasions?

24 A. Yes, it has.

25 Q. I'd like to show you what's been previously

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1 marked as Exhibit 352, a document produced by Philip
2 Morris in discovery bearing Bates stamp number
3 2022245801 through 5823, a document -- well the cover
4 page is dated July 25th, 1974. It's from marketing
5 research department to a distribution list, and it's
6 entitled "Highlights of Special Roper Study on Young
7 Smokers."

8 A. Uh-huh.

9 Q. Do you see that?

10 A. I do.

11 Q. Okay. You were one of the people who got this
12 document back in 1974; correct?

13 A. I did.

14 Q. Okay. And what's the --

15 If you turn to the second page -- page, what's
16 the title of the document?

17 A. "THE NEW COMPETITION FOR MARLBORO'S FRANCHISE."

18 Q. And who wrote it according to this?

19 A. Marketing research department.

20 Q. Of what?

21 A. Of Philip Morris.

22 Q. Okay. Now turn to the second page of the -- of
23 the -- the -- the report itself, the third page of
24 the document. Do you see the section that says "What
25 Was Done"?

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- 1 A. Yes, I do.
- 2 Q. Yeah. And what --
- 3 And what does it say there?
- 4 A. It says "The Roper Organization was commissioned
- 5 to undertake the study summarized here, with the
- 6 intention of probing the dynamics of the market among
- 7 smokers below the age of 24. (This was not the
- 8 'usual' sample of 18 to 24; in this study, no lower
- 9 age limit was set.)"
- 10 Q. Why was the Roper Organization commissioned to
- 11 undertake a study to probe the dynamics of smokers
- 12 with no lower age limit?
- 13 A. I'm not sure what the answer to that would be.
- 14 I -- I -- not having commissioned the study or been
- 15 part of it, I received the report, but --
- 16 Q. Did you ever review the report itself from the
- 17 Roper Organization?
- 18 A. I probably did at the time, but I -- I really
- 19 don't -- don't remember. 1974 I would have been an
- 20 assistant brand manager.
- 21 Q. Of what brand?
- 22 A. I think Virginia Slims.
- 23 Q. Were you -- does it -- did it --
- 24 A. I do not think. I know Virginia Slims.
- 25 Q. Okay. Did it concern you in 1974 that Philip

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1 Morris had hired the Roper Organization to conduct a
2 study into the dynamics of the market of smokers with
3 no lower age limit?

4 A. I don't remember my reaction again in 1974, what
5 I did or didn't think. My focus was on Virginia
6 Slims and my focus was on building marketing
7 programs, developing marketing programs for Virginia
8 Slims, and again I felt very comfortable in our
9 practices and in our internal policy and the way we
10 conducted our business. And that was my main
11 concern.

12 Q. Philip Morris was aware that it was a dominant
13 brand among 15- to 17-year-olds, wasn't it?

14 A. That --

15 MR. HOWARD: Objection.

16 Q. For at least the last 20 years Philip Morris has
17 known that it was the number-one brand among 15- to
18 17-year-olds; isn't -- isn't that true?

19 A. Are we talking -- are we talking about Virginia
20 Slims or --

21 Q. Philip -- Marlboro.

22 A. Oh, sorry.

23 Q. What did I say?

24 A. You didn't.

25 MR. HOWARD: You said "Philip Morris."

1 Q. I'm sorry.

2 A. We were talking about Virginia Slims, so I was
3 confused.

4 Q. I understand the confusion, so let's start
5 again.

6 For at least the last 20 years Philip Morris was
7 aware that Marlboro was the number-one brand among --
8 among 15- to 17-year-olds; correct?

9 A. I don't -- I don't know that I would necessarily
10 agree with your time frame, but the fact is Marlboro
11 is the number-one-selling brand in the country and
12 Philip Morris is certainly aware of the fact that
13 there is an underage smoking issue and problem, which
14 is why we've been so proactive in trying to do
15 something about it. So it would come as no surprise
16 that if Marlboro is the number-one-selling brand
17 among almost every demographic group in the country,
18 that it would also sell to underage smokers.

19 Q. Let me show you what's been previously marked as
20 Exhibit 685, a document produced by Philip Morris
21 bearing Bates stamp number 2041761868 through 1871, a
22 memorandum dated November 10, 1977 from N. Holbert to
23 J. Zoler entitled "Incidence of Smoking."

24 A. I do. I've seen it.

25 Q. Okay. And this has attached to it two different

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1 tables, one a table of the incidence of adult smoking
2 and the second an incidence of teenage smoking;
3 right?

4 MR. HOWARD: Objection again to the
5 definition of "teenage smoking."

6 A. Yeah, part of this is fairly unreadable, but I
7 do see that, what you're -- you're referring to.

8 Q. Okay. And let's focus on the second table, the
9 last page, the incidence of teenage smoking in USA, a
10 compilation.

11 A. Uh-huh.

12 Q. Do you see the ages are listed at the top
13 there? Right?

14 A. Uh-huh.

15 Q. So there's no ambiguity about what age-groups
16 are being reflected here; right?

17 A. That's correct.

18 Q. Okay. And under "Source" there are a series of
19 code letters, and the codes appear at the bottom
20 there. Do you see that?

21 A. Yeah, American Cancer Society and others, yes.

22 Q. Well what's -- what's Q?

23 A. Department of Health.

24 Q. No, the source Q under --

25 A. Oh, I can't read the -- ORC.

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1 Q. Right. Isn't that Opinion Research Corporation,
2 isn't it?

3 A. Well is it? I don't know.

4 Q. Okay. Well take a look at 1973, which shows
5 that its -- the source is Q or this ORC survey, and
6 under 12 to 17 it shows a total incidence of 13, male
7 14 and female 13. Those are the same numbers that we
8 just looked at a few moments ago from the 1973
9 Opinion Research study; --

10 A. Uh-huh.

11 Q. -- right?

12 And apparently there was a 1971 Opinion Research
13 Corporation study that showed a 20 percent
14 penetration of the 12-to-17-year-old market?

15 MR. HOWARD: Objection, no foundation.

16 A. There is a 20 under the 12 to 17. I don't know
17 what --

18 Q. And that would --

19 That's the same group that did that 1973 study,
20 the ORC survey; right?

21 MR. HOWARD: Objection, no foundation.

22 A. I -- I can only assume. I don't -- I don't know
23 that for sure.

24 Q. So apparently Opinion Research Corporation was
25 providing data to Philip Morris on 12- to

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1 17-year-olds smoking in the '60s and in the '70s on
2 multiple occasions; right?

3 MR. HOWARD: Objection, no foundation.

4 A. I can only respond to the documents that you
5 showed me. I can't --

6 Q. Your counsel objected on foundation grounds. I
7 want to clarify. You don't know; right?

8 A. I don't know.

9 Q. And --

10 And you didn't do anything to find out, right,
11 to prepare yourself for this deposition?

12 A. I did not do anything to find out what Opinion
13 Research had been doing, no.

14 Q. Okay. You've heard of Leo Burnett USA, haven't
15 you?

16 A. Yes, I have.

17 Q. That's a advertising firm; --

18 A. It's --

19 Q. -- correct?

20 A. -- our ad agency, that's correct.

21 Q. It's been Philip Morris's ad agency for decades;
22 right?

23 A. That is correct.

24 MR. HOWARD: Can we go off the record for a
25 moment?

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1 MR. GORDON: Do you need a break?

2 MR. HOWARD: Yeah, I really do.

3 THE REPORTER: Off the record, please.

4 (Recess taken.)

5 BY MR. GORDON:

6 Q. I'm showing you what's been marked as

7 Exhibit 679, a document produced by Philip Morris

8 bearing Bates stamp number 2048677983 through 78044,

9 a document entitled "YOUNG ADULT SMOKER TARGET, AN

10 IN-DEPTH LOOK" --

11 A. Uh-huh.

12 Q. -- prepared for Philip Morris USA

13 September 22nd, 1989 --

14 A. Uh-huh.

15 Q. -- by the research department of Leo Burnett

16 USA.

17 Have you seen this document before?

18 A. Yes, I have.

19 Q. Okay. I want to direct your particular

20 attention to I guess the pages -- well maybe they're

21 numbered. It looks like page 12 in the lower

22 left-hand corner, Bates number 7994.

23 A. 994.

24 Q. Do you see that? Do you have the same page,

25 Roman numeral "II, A LOOK AT OUR U.S. TARGET: WHERE

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- 1 THEY ARE"?
- 2 A. Uh-huh.
- 3 Q. What --
- 4 A. Yes, I see that.
- 5 Q. What does that phrase refer to, "U.S. TARGET"?
- 6 A. I -- I would assume it means our young adult
- 7 smokers, 18 years of age and above.
- 8 Q. In marketing parlance, what is a target?
- 9 A. It could mean an audience, you know, your
- 10 target, your audience, your focus, your program. I
- 11 mean, it's all -- it's a bit of lingo, but it's -- it
- 12 all means pretty much the same. It -- it really
- 13 means your audience.
- 14 Q. Okay. And according to this report, this
- 15 particular target -- and I assume that means to young
- 16 adult smokers. That's -- that's what this whole
- 17 report is about; right?
- 18 A. That's what I indicated, yes.
- 19 Q. Okay. And it says that -- that these particular
- 20 target -- this particular target is at a unique stage
- 21 in life; right?
- 22 MR. HOWARD: Objection. The document
- 23 speaks for itself.
- 24 A. Where do you see the word "unique"?
- 25 Q. Right -- right under Roman numeral II, "IN ORDER

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1 TO REALLY" --

2 A. Yes, I see that. Sorry.

3 Q. Okay.

4 A. Yes.

5 Q. It says "FIRST, THEY ARE A 'MOVING' TARGET, IN

6 TRANSITION FROM ADOLESCENCE TO YOUNG ADULTHOOD";

7 right?

8 A. That's right.

9 Q. So they're not yet at adulthood; right? They're
10 in transition from adolescence to young adulthood?

11 MR. HOWARD: Objection.

12 A. Our target, our audience is in adulthood.

13 They're 18 and over, and as I say, there certainly is
14 some lingo and some buildup in this report, but the
15 fact is I think I have to just say that what we did
16 with this report, how we used it was to understand
17 the young adult smoker who is the audience for
18 Marlboro as well as some of our other brands, and
19 that's what this study is all about.

20 Q. Does Philip Morris disagree that the young adult
21 smoker is in transition from adolescence to young
22 adulthood?

23 A. Well I -- I would assume that if someone becomes
24 18, 19, 20, they're in transition. It's a
25 transitional time in one's life, going from being a

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1 student and going into the work force, so they're
2 getting married. There are a lot of transitions that
3 happen in a -- a young adult's life. Once they
4 become a young adult and 18, they start -- as I -- we
5 said before, they might have to face military
6 service. They certainly get the opportunity to vote
7 for the first time. There are a lot of things that
8 are happening, so it is a transitional period.

9 Q. Okay. Turn to the next page, if you would.
10 That's -- the first line on this page is that it is a
11 "KEY TASK AT THIS STAGE IS FOR TARGET TO ESTABLISH
12 OWN IDENTITY." Do you see that?

13 A. I do.

14 Q. And that was something that Philip Morris
15 considered in its marketing to the young adult smoker
16 target?

17 MR. HOWARD: Objection. I think it's
18 ambiguous.

19 A. I -- I believe what this study is telling us, if
20 you start reading it from the very beginning, is
21 describing some of the conditions that exist among
22 this audience, understanding the 18-to-24-year-old
23 target, which is what it says on -- clearly on the
24 first page. I mean, that -- that is the target.
25 What are they all about? What are their concerns?

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1 Who are they? What do they think about? Where are
2 they?

3 It doesn't mean that as you pick out sentence by
4 sentence that that's what we thought about
5 specifically in thinking about how to market our
6 brand. Yes, of course you understand -- try to
7 understand your market, which is what we tried to do,
8 and then a marketing program is put together to
9 market to young adults 18 and over. And -- and
10 that's what we've always said we -- we've done.

11 Q. Those ones in transition from adolescence to
12 adulthood; right?

13 MR. HOWARD: Objection.

14 A. Well, you know, I mean, some 18- to 24-year-olds
15 are in transition and some of them were established.
16 We market to adult smokers. I mean, I really think
17 that is the point, that our marketing programs are
18 focused on adult smokers, and there are many
19 conditions that exist among those adults.

20 Q. Okay. And this --

21 The whole purpose of this study was to assist
22 you in developing a marketing program that would be
23 most effective in marketing to this particular target
24 group; right?

25 A. It was, from where I sit, a -- a -- a research

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1 document that would help us understand the market and
2 then perhaps extrapolate some of the information to
3 help us develop marketing programs, but often a lot
4 of what you find out in these studies you -- you find
5 out, you file away and really plays no particular
6 part in your program.

7 Q. Turn to page -- to what would be page 14, I
8 guess, 7996. And the first line there says "DURING
9 THIS STAGE, TARGET ENJOYS FREEDOM TO EXPERIMENT WITH
10 NEW POSSIBILITIES WITHOUT HAVING TO COMMIT." Do you
11 see that?

12 A. Yes, I do.

13 Q. Smoking could be a new possibility that they
14 could be free to experiment with; right?

15 MR. HOWARD: Objection, calls for
16 speculation.

17 A. Might be, but they're talking about live-in
18 boyfriends, no parents, freedom, maybe not having to
19 work. I mean, I think there are a lot of
20 possibilities for young adults to think about.

21 Q. Sure. And if a young adult experiments with
22 something that is addictive, that could rob them of
23 their ability to give it up if they so choose;
24 right?

25 MR. HOWARD: Objection as to form.

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1 A. I can't comment on that. I'm not an expert on
2 addiction.

3 Q. Well have you ever heard the word "addiction"
4 before?

5 A. Yes, of course I have.

6 Q. You --

7 Would you acknowledge that there are certain
8 things that are addictive?

9 A. I believe there are things in life that are
10 addictive.

11 Q. And if a -- a -- a young adult who's enjoying
12 the freedom to experiment with possibilities starts
13 experimenting with something that's addictive, they
14 no longer have the freedom to choose to give it up;
15 right?

16 MR. HOWARD: Objection.

17 A. Oh, I think you always have the freedom to
18 choose. It's a matter of what you have to do to --
19 to make that choice.

20 Q. Fair enough. If they choose to experiment with
21 something that is actually addictive, their ability
22 to choose to give it up is limited by the fact that
23 it -- they've chosen to engage in something that's
24 addictive; right?

25 MR. HOWARD: Objection again.

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1 A. I -- I really believe that that is a generality,
2 and I would have no comment beyond that.

3 Q. And you --

4 I take it you would agree that it would be
5 reprehensible for a cigarette manufacturer to do
6 anything to its products to make it more difficult
7 for somebody who experiments with them in this
8 transitional phase to ultimately give them up once
9 they've experimented with them; right?

10 MR. HOWARD: Objection, vague.

11 A. I -- I -- I would rather answer your question by
12 saying we don't do anything to our products.

13 Q. I'm not suggesting that you do.

14 A. All right.

15 Q. I'm just asking you would agree that if a
16 cigarette --

17 A. Well, I mean, that's a hypothetical. That's a
18 hypothetical question that, you know, I thought we
19 didn't want to get into hypothetical discussions.

20 Q. Well I want to -- I want to get into Philip
21 Morris's position. Philip -- you've been very
22 eloquent today about explaining Philip Morris's
23 position on not wanting youth to smoke, and we've
24 just gone through a document now that talks about
25 the -- the young adult smoker being in a transition

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1 phase -- transitional phase from adolescence to
2 adulthood and having the freedom to experiment with
3 new possibilities without having to commit, and my
4 question to you is: Would -- would you agree --
5 "you" being Philip Morris -- agree that it would be
6 reprehensible for a cigarette manufacturer to do
7 anything to its product to make it more difficult for
8 somebody who chooses to -- to quit smoking after
9 having experimented with it?

10 MR. HOWARD: Objection as to form. Answer
11 if you're able.

12 A. Yeah, it's -- it's -- it's -- I -- I would think
13 it would -- I would not be in favor of us certainly
14 or any other tobacco company doing something to the
15 product that was not a natural part of the product
16 and inherent in the product to start with if that's
17 what you're asking me. But I think that -- you know,
18 I don't believe that smoking is addictive and I don't
19 believe that we would make it impossible for young
20 people to choose not to smoke once they try.

21 Q. You would agree that for some people it is
22 difficult to give up smoking?

23 A. Certainly.

24 MR. HOWARD: Objection as to form. Go
25 ahead.

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1 A. I believe for some people it's difficult to give
2 up chocolate.

3 Q. Okay. And you would agree that it would be
4 improper conduct on the part of a cigarette
5 manufacturer to do anything chemically to a cigarette
6 to make it even more difficult for some people to
7 give up smoking; correct?

8 MR. HOWARD: Let me just object at this
9 point. This is going far afield to the 30.02(f)
10 designation for this witness, and I want it perfectly
11 clear that the responses on this line of questioning
12 are on behalf of herself and not as a Philip Morris
13 designee, not that her answers are not -- let me just
14 leave it at that.

15 A. Could you repeat your question?

16 Q. You would agree that it would be improper
17 conduct on the part of a cigarette manufacturer to do
18 anything chemically to a cigarette to make it even
19 more difficult for some people to give up smoking;
20 correct?

21 MR. HOWARD: Objection, lack of
22 foundation.

23 A. Again I -- I am much more comfortable from my
24 standpoint talking about what our practices are as
25 opposed to dealing in hypotheticals as to what would

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1 or would not be, and our policy about smoking and
2 smoking -- smokers is very clear. We believe that
3 smoking should be an individual adult choice, and the
4 adult should be free to make the choice to smoke and
5 the adult should make -- be free to make the choice
6 not to smoke or to stop smoking if that is their wish
7 or desire.

8 And we as a company don't do anything to in any
9 way influence that choice. What we do is once the
10 choice is made, we certainly market to those adult
11 smokers to ensure that they choose our brand over our
12 competitors', and that's what we do.

13 Q. And with respect to young adult smokers, it's
14 Philip Morris's position that it would be wrong for
15 Philip Morris to do anything to its cigarettes to
16 make it more difficult for a young adult smoker to
17 choose to quit smoking?

18 MR. HOWARD: Objection, again lack of
19 foundation and also assumes facts not in evidence.

20 A. I would say that it is our policy for all
21 smokers, young adult, older adult, men, women,
22 anybody. We believe that the decision to smoke is an
23 adult decision and that an adult has a right to make
24 that decision and have it respected. By the same
25 token, an adult has a right to make the decision not

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1 to smoke, and if that were that person's decision,
2 then that has to be respected.

3 And that's how we conduct our business and our
4 marketing activities, and we do nothing to in any way
5 try to influence the decision whether or not to
6 smoke.

7 Q. And whether or not to quit smoking?

8 A. Whether or not to quit smoking, but once that
9 decision is made, then -- then it is up to the adult
10 and we respect it one way or the other.

11 Q. And it would be wrong for Philip Morris to do
12 anything chemically to its cigarettes to make it
13 harder for people who choose to give up smoking to
14 actually do that?

15 MR. HOWARD: Objection as to form. You may
16 answer again.

17 A. It's -- it's not a matter of would be, wouldn't
18 be. We don't.

19 Q. And you would agree that it would be improper
20 for Philip Morris to market its legal product
21 illegally by trying to attract youth; right?

22 A. I absolutely believe that it would be wrong for
23 us to market our legal product illegally.

24 Q. And marketing to youth would be --

25 A. That's right.

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1 Q. -- illegal?

2 A. There are -- there are minimum-age laws in all
3 50 states. We not only observe those laws, but as I
4 was telling you earlier, we have gone out of our way
5 to create proactive programs to deny youth access to
6 our -- our products through Action Against Access and
7 other steps that we have taken over the years in
8 support of any number of programs to ensure that
9 youth are not only denied access but understand that
10 they should not buy cigarettes, et cetera.

11 We've worked with local law enforcement,
12 community leaders, legislators, helped pass
13 legislation in many states, supported minimum-age
14 laws at the time, so our focus has definitely been
15 over the years in trying to prevent youth access.

16 MR. GORDON: No disrespect intended, but I
17 move to strike that as nonresponsive.

18 MR. HOWARD: I think it was entirely
19 responsive.

20 MR. GORDON: No, and that's why we have a
21 judge; he'll make that decision.

22 MR. HOWARD: That's correct.

23 MR. GORDON: Thank you. I have nothing
24 further.

25 MR. NUNLEY: Just one thing, Mr. Gordon, on

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1 that. Your comment about the judge making a decision
2 is a perfect segue into this. I understand that the
3 judge has indeed made a decision on a -- a topic you
4 and I have had some correspondence on, and that is
5 your failure to designate or to identify on your
6 designation of documents which documents you intended
7 to use with which witnesses.

8 I understand Judge Fitzpatrick was asked to rule
9 on that today and did so and ruled that the
10 plaintiffs have a good-faith obligation to identify
11 those documents they intend to use with the specific
12 30.02(f) witnesses, and as we're finished with
13 Ms. Merlo -- Ms. Merlo, I'd ask you to prepare to
14 tell us that before we start Mr. Mikulay's deposition
15 and certainly to be in a position to tell us that as
16 to Dr. Ellis.

17 MR. GORDON: Well I'm not familiar with the
18 ruling. Obviously I wasn't in court today and I --
19 I'm not in a position where I can tell you right
20 now.

21 MR. NUNLEY: Well you can certainly call
22 and find out from your colleagues who are in
23 Charlotte.

24 MR. GORDON: It wouldn't matter what --
25 what the ruling is in terms of my ability right now

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1 to --

2 MR. NUNLEY: I'm sure you have the
3 documents you intend to use with Mr. Mikulay
4 available, don't you?

5 MR. GORDON: I have a number of documents
6 that I may or may not use with Mr. Mikulay. Plus, we
7 have all the documents that have been marked as
8 exhibits that are -- that are predesignated.

9 MR. NUNLEY: Why don't you show your good
10 faith and -- and let us see those that you plan to
11 use with Mr. Mikulay beforehand, as you should have
12 done --

13 MR. GORDON: Well, you know what? I'm
14 going to -- I'm going to call my colleagues because
15 I --

16 MR. NUNLEY: Good.

17 MR. GORDON: -- not that I don't trust your
18 representation, but there have been instances before
19 where information has been provided in depositions
20 that for some reason has not been a hundred percent
21 accurate, so I will do that.

22 MR. NUNLEY: Good.

23 MR. GORDON: Why don't we take a break.

24 MR. HOWARD: Before we go off the record,
25 is Ms. Merlo excused or does the State of Washington

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1 have any inquiry for her?

2 MR. JARVIS: The State of Washington at
3 this time has nothing to ask Ms. Merlo, perhaps at a
4 later time.

5 MR. HOWARD: Well --

6 MR. JARVIS: In a fact, not in a 30(b)(6).

7 MR. HOWARD: Okay.

8 THE REPORTER: Off the record, please.

9 (Recess taken.)

10 (Witness sworn.)

11 MR. GORDON: I just want to note something
12 on the record. At the -- at the conclusion of
13 Ms. Merlo's testimony, Mr. Nunley informed me of a --
14 of a ruling today from Judge Fitzpatrick regarding
15 predesignation of documents.

16 I want the record to reflect that in the break I
17 gave Mr. Nunley a copy of each of the documents that
18 I am likely to use with Mr. Mikulay today. It's
19 difficult obviously to predict what his testimony
20 might be and whether there may be other documents,
21 and certainly there are some of the documents that --
22 that I gave Mr. Nunley that I may well not use with
23 Mr. Mikulay. I was able to do that because I have
24 already segregated them out and was ready to go.

25 I do want to note our objection to -- to this

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1 process and in particular our objection to the manner
2 in which the court ruling this afternoon was
3 obtained. It is my understanding from a phone
4 conversation -- and of course I, you know, note
5 that -- that information transmitted this way can get
6 garbled, but it's my understanding that the ruling
7 was issued by the court in a video conference with
8 the deposition ongoing now in Charlotte, North
9 Carolina, and during the deposition it is my
10 understanding that the defendants in that case asked
11 the court to direct the plaintiffs now to
12 predesignate specific documents for specific 30.02(f)
13 deponents despite the fact that all the 30.02(f)
14 depositions of the plaintiffs' deponents are
15 completed and the defendants never so designated --
16 predesignated documents for the depositions they took
17 of our people and that when this was called to the
18 court's attention, the defense counsel represented to
19 the court that the reason defense counsel had not
20 predesignated for separate deponents in the
21 plaintiffs' 30.02(f) depositions was because the
22 plaintiffs had not identified specific individuals
23 more than ten days in advance of the deposition,
24 which is a -- an inaccurate and incorrect statement.
25 I don't -- I do not believe the court was fully

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1 apprised of the history of this case and was misled
2 by the representations. At least that's my
3 understanding. Nevertheless, given that the court
4 directed us to use good faith to predesignate, I have
5 provided Mr. Nunley with the documents that I am most
6 likely to use with this particular witness.

7 With respect to the last 30.02(f) witness, I --
8 it's a much more difficult situation. Her topic
9 areas cover more than half of the 30.02(f) topics.
10 In addition, she is testifying as an expert and her
11 expert areas cover almost the entire scope and
12 breadth of the lawsuit. And it was for that reason
13 that our -- that our predesignation in toto was the
14 largest I have done in predesignating any -- any
15 documents for a deposition simply because there were
16 so many subject areas on which this person is --
17 is -- will be testifying, Dr. Ellis.

18 For that reason, my ability to identify the
19 specific documents that we will use with -- with
20 Dr. Ellis is much different than it was with
21 Mr. Mikulay. I can represent to counsel that I will
22 not be using any of the documents that I marked or
23 used with my examination of Ms. Merlo. I'm virtually
24 certain I will not use any of the documents that I'm
25 about to use with -- with Mr. Mikulay. I am equally

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1 certain that I may -- may well use some of the
2 documents that I used today with Dr. Houghton as well
3 as that we used this morning -- well we didn't use
4 very much, but possibly a little bit with what we
5 used with Ms. Purcell.

6 But beyond that, the bulk of our predesignation
7 is -- really does cover almost everything else
8 Dr. Ellis is going to testify. I'm sure there are
9 some specific marketing and advertising documents and
10 probably some youth-specific documents that were
11 predesignated in anticipation of using them with
12 Mr. Mikulay or Ms. Merlo that we won't be using
13 with -- with Dr. Ellis.

14 Other than that, pretty much everything on our
15 predesignation, other than the exclusions that I've
16 just mentioned, are things that we're going to be
17 taking a look at. I -- I in New York have eight
18 banker's boxes of documents, and we're trying and
19 will be continually whittling them down as we -- as
20 we go forward in preparing for and actually during
21 the taking of the deposition of Dr. Ellis, but given
22 the scope -- scope and breadth of the areas she's
23 going to be testifying on, there -- there's going to
24 be a lot of documents.

25 I will note that I do not anticipate using any

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1 of the outside published articles that were
2 referenced in her expert test -- report in the
3 30.02(f) portion of her deposition; however, we
4 reserve the right to use them on the expert portion
5 of her deposition. I don't know if that helps at all
6 because we -- we still may use them.

7 I also note, by the way, that on -- on
8 September 19th Philip Morris served us with a list of
9 several hundred additional documents that Dr. Ellis
10 is purportedly relying on in her -- in her expert
11 opinion, which presumably she has reviewed in -- in
12 the last several weeks or even months, and given that
13 we were served with this list just on -- on the 19th,
14 we have not had any meaningful opportunity to examine
15 any of those documents. But we're going to limit our
16 examination to the documents that had been previously
17 identified as the documents she re -- relied on.

18 MR. NUNLEY: Well let me just say that I'm
19 sort of shocked that Mr. Gordon would criticize Judge
20 Fitzpatrick's ruling given that he wasn't even there
21 for the argument and, as far as I know, didn't even
22 know what the ruling was in toto or that he would
23 accuse cocounsel in this case of making
24 misrepresentations to the court, again given that he
25 wasn't there, but I guess that speaks for itself.

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1 Certainly we'd like to have -- have had the
2 documents for Mrs. Purcell, Mr. -- Dr. Houghton,
3 Ms. Merlo and Mr. Mikulay in time to make some use of
4 them. We do appreciate the gesture of turning over
5 the documents to be used for Mr. Mikulay 15 minutes
6 or so before the deposition was to begin, and
7 obviously I think the record's clear that we can only
8 make so much use of them.

9 To the extent that -- that the court has asked
10 for counsel to exercise good faith in providing us
11 predesignations for the 30.02(f) deponents, I don't
12 think you can simply say, "Well, consider everything
13 that -- that we've not yet used in this 30.02(f) to
14 be fair game for Dr. Ellis." I don't think that
15 meets the letter or the spirit of the court's ruling,
16 and I hope counsel after some cool reflection outside
17 the crucible of the deposition room will realize
18 maybe the more appropriate thing to do would be to
19 give us a reasonable cut at what he expects to use
20 with Dr. Ellis, and we'll be standing by to receive
21 that.

22 And I might also say that Exhibit 1301 or what
23 was introduced as 1301 was not Category II, has been
24 returned to us. Exhibit 1302 was Category II, and
25 the court reporter has entrusted us with the original

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1 of that. I believe 1301 was copied, and the court
2 reporter has a photocopy of that document.

3 MR. GORDON: Sorry for all that,
4 Mr. Mikulay.

5 He's sworn?

6 THE REPORTER: Yes.

7 MR. GORDON: Okay.

8 ROBERT L. MIKULAY

9 called as a witness, being first duly
10 sworn, was examined and testified
11 as follows:

12 ADVERSE EXAMINATION

13 BY MR. GORDON:

14 Q. Could you state your full name for the record,
15 please.

16 A. My name is Robert L. Mikulay.

17 Q. And your current employment, sir?

18 A. I'm employed by Philip Morris USA --

19 Q. What's your position --

20 A. -- as senior vice president, marketing.

21 Q. How long have you held that position?

22 A. Since December of 1994.

23 Q. How long have you been employed by Philip Morris
24 in any capacity?

25 A. Slightly over 22 years.

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1 Q. Has that been in marketing the whole time?

2 A. It has not. I've been a member of the marketing
3 department since the middle of 1989.

4 Q. What departments were you in before that?

5 A. Prior to that, I was in the sales organization
6 for approximately four years, a member of the
7 operations department for approximately two years
8 before that, and the remainder of the time pre-1983
9 was in our Richmond, Virginia, facility as a member
10 of the human resource department.

11 Q. What is the purpose of the Philip Morris
12 marketing department?

13 A. The purpose of the Philip Morris marketing
14 department is to design, develop and execute brand
15 marketing and advertising programs for our portfolio
16 brands.

17 Q. What's the end goal of those activities?

18 A. The end goal of -- of what we do is to increase
19 our share of market in the U.S. marketplace. We
20 design and execute programs for each of our brands
21 that speak to the adult smokers of our brands to
22 reinforce their brand choice, to ensure that they
23 stay with their -- their brand choice, minimize their
24 alternate occasional purchase of competitive brands
25 and to speak to adult consumers of competitive

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1 products of ours in an attempt to convince them to
2 try and hopefully switch to our brands.

3 Q. Okay. When you say increase share of market,
4 you mean to increase your sales?

5 MR. HOWARD: Objection.

6 Q. Right?

7 A. No. I mean increase share of the existing
8 market.

9 Q. So you don't care about your actual number of
10 sales? You just are interested in the percentage
11 of -- of the existing market that Philip Morris can
12 claim?

13 MR. HOWARD: Objection as to form. You can
14 answer.

15 A. We are concerned with -- with our sales. There
16 have been periods of time where -- in the past where
17 the size of the industry has been increasing, and in
18 order to grow our market share, part of what may have
19 been part of the strategy would be to -- to grow
20 volume and grow share at the same time. For the last
21 15 years, the U.S. industry has been characterized by
22 overall decline on the basis of somewhere in the
23 neighborhood of 1 to 2 percent a year. It's become
24 much more of a -- of a market-share activity.

25 Q. When you say "grow volume," you mean sell more

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1 cigarettes; right?

2 A. That's correct.

3 Q. And the more cigarettes you sell, the more money
4 Philip Morris makes; right?

5 A. It would depend on a number of factors. There
6 have been points in time where we've sold more
7 cigarettes and they happen to be what we refer to as
8 discount cigarettes where the margins are lower than
9 premium cigarettes, and so it doesn't necessarily
10 equate that -- that profitability follows. There
11 certainly could be situations where the amount that
12 you spend to gain that market share or the way that
13 you spend it, if you spend it inefficiently, may not
14 translate into -- to increased profits.

15 Q. Ultimately the goal of the Philip Morris
16 business is to increase profits for the benefit of
17 shareholders; right?

18 A. That -- that is correct.

19 Q. If half of the smokers in the United States were
20 to stop smoking today but they all stopped smoking
21 your competitors' brands, that would increase Philip
22 Morris's share of the market; correct?

23 A. Yes, it would.

24 Q. But it wouldn't necessarily increase profits;
25 right?

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1 MR. HOWARD: Objection.

2 A. I can't say whether it would or would not. It
3 might. The U.S. cigarette marketplace is -- because
4 it's a declining industry is a very competitive
5 marketplace. If the hypothetical situation that you
6 described occurred, we, for example, may spend less
7 money on some of our programs than we have to today
8 in order to fight for the market share that we have.

9 Q. Okay. Let's go over the ways that you can
10 increase profitability. One would be to switch sales
11 over to higher-margin items; right?

12 MR. HOWARD: I just want to object at this
13 point. I think this does go beyond the 30.02(f)
14 designation, and in this capacity Mr. Mikulay, if
15 he's able, can speak for himself and of his own
16 knowledge.

17 A. I'm sorry, could you ask the question again?

18 Q. One of the ways that Philip Morris can increase
19 its profitability is to -- is to switch its mix of
20 sales to the higher-margin items; right?

21 A. That would be a possible way to increase profits
22 assuming that you maintain efficiencies in terms of
23 your spending.

24 Q. Another way to do it is to decrease your
25 spending on marketing and advertising, assuming

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1 everything else stays the same?

2 MR. HOWARD: Objection as to form.

3 Q. Is that right?

4 A. In your hypothetical question, that -- that
5 would be true, assuming everything else would stay
6 the same and that share of market would not drop as a
7 result of reduction in spending.

8 Q. Okay. Another way would be to increase absolute
9 volume of sales; right?

10 MR. HOWARD: Objection as to form.

11 A. Again in your hypothetical example, that could
12 be correct, assuming that business efficiencies were
13 maintained and the way -- the way that you spent to
14 increase that volume was done in an efficient way and
15 that that didn't equate to a shift from higher-margin
16 to lower-margin products, for example, that
17 translated into higher volume.

18 Q. And all three of those are -- are goals of the
19 marketing department; right?

20 MR. HOWARD: Objection. All three of
21 what?

22 Q. Those ways of increasing profitability:
23 Shifting purchasers to higher-margin items; spending
24 as efficiently on marketing and advertising, in other
25 words, giving them the biggest bang for your

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1 advertising and marketing buck; and increasing the
2 absolute volume of sales. Right?

3 MR. HOWARD: Objection as to form.

4 A. The objective of the marketing department and
5 the responsibility I have is to increase my share of
6 market and increase the share of my various brands in
7 the U.S. marketplace.

8 Q. What --

9 What's the difference between advertising and
10 marketing?

11 A. In -- in my language, I -- I utilize "marketing"
12 to describe a broader array of programs used to
13 communicate to -- to consumers to market our products
14 to them. "Advertising" I tend to think of as the ads
15 that we would place in publications or billboards, so
16 a component of marketing.

17 Q. Give me some examples of things that are -- that
18 are marketing but aren't advertising.

19 A. In our parlance, I would -- I would consider a
20 promotion that's delivered to consumers at retail.
21 As an example, if you buy four packs of this brand
22 today, there's one free pack attached. We -- I would
23 tend to talk about that as -- as a retail promotion,
24 part of the marketing mix, and don't generally talk
25 about it as advertising, although there's an

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1 advertising component that would go along with that
2 in terms of the communication at retail as to the
3 offer and the brand that's making the offer.

4 Q. Coupons would be another form?

5 A. Coupons would, yes.

6 Q. So advertising and promotion are both aspects of
7 marketing; is that correct?

8 A. That's correct.

9 Q. Sponsorship of cultural events, that would be an
10 aspect of marketing?

11 A. Sponsor -- our brands do engage in sponsorship
12 of certain events, another opportunity to -- to reach
13 our consumers or our competitors' smokers.

14 Q. And that's all part of marketing? The overall
15 department is marketing; right?

16 A. That's correct.

17 Q. And you're here today to testify as the Philip
18 Morris spokesperson on issues of advertising,
19 marketing and promotion; right?

20 A. That's correct.

21 Q. Philip -- it's Philip Morris policy -- strike
22 that.

23 Philip Morris only advertises to get switchers
24 to its cigarettes and to keep its existing smokers
25 smoking Philip Morris cigarettes; right?

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1 A. We advertise to speak to the -- the adult
2 smokers of our brands, to reinforce the choice that
3 they've made in that brand with the hope that they
4 stay with that brand, to encourage that the -- the
5 largest possible share of their purchase requirements
6 are from that brand as opposed to occasionally
7 purchasing competitive brands as well as to speak to
8 adult consumers of competitive brands with the
9 objective of getting them to try our brands and
10 obviously potentially switch to our brands.

11 Q. What about people who have made a decision to
12 start smoking but haven't yet decided which brand to
13 try first? Does Philip Morris market to them at
14 all?

15 A. Well to the extent that our marketing programs
16 are designed, as I indicated, and our brand programs
17 are designed to -- to build our brands and build our
18 brand equity and speak to adults who have made the
19 decision to smoke, yes, that would be part of the
20 audience that we would potentially be speaking to in
21 our programs.

22 Q. And those people are known as starters; right?

23 MR. HOWARD: Objection, no foundation.

24 A. Internally I have or I've heard them referred to
25 as new smokers. I've heard some people utilize the

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1 phrase "starters."

2 Q. Not something that you use?

3 A. I may have at -- from time to time.

4 Q. Okay. And it's Philip Morris's position that

5 advertising does not create any desire for nonsmokers

6 to start smoking; is that correct?

7 A. My understanding is that the reason people start

8 smoking has more to do with whether or not their

9 peers smoke, influence from their parents, whether or

10 not their parents smoked, and that -- that

11 advertising doesn't -- doesn't influence that

12 decision. As I said, our objective and -- and our

13 strategy is to speak to adults who have chosen to

14 smoke and reinforce brand choice.

15 Q. Could advertising influence the decision to

16 start smoking if you set that out as a goal?

17 MR. HOWARD: Objection, calls for

18 speculation.

19 A. I don't have any where -- way to answer that. I

20 couldn't confirm or deny whether -- whether it

21 could. I can't imagine in a -- in a mature product

22 category that is a well-known category, been in

23 existence for hundreds of years, that there would be

24 any news value in that -- in that hypothetical

25 situation. And -- and what we do is -- is speak to

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1 people who have decided -- adults who have decided to
2 smoke.

3 Q. Right. What I'm trying to understand, let me
4 see if I can explain it and see if you can help me
5 out. As I understand Philip Morris's position, the
6 position is that -- that cigarette advertising does
7 not influence the decision whether or not to smoke.
8 Right?

9 A. That's correct.

10 Q. And my question is: Is that --

11 Is it Philip Morris's belief that advertising
12 doesn't influence the decision whether to smoke
13 because for whatever reason it's inherently
14 impossible for advertising to do that or because the
15 cigarette manufacturers have made a conscious choice
16 not to advertise in such a way that its advertising
17 would influence the decision whether or not to
18 smoke?

19 MR. HOWARD: Objection as to form.

20 A. I can't answer the -- the first part of that. I
21 have no -- the hypothetical portion of it. I have no
22 basis for knowing one way or the other. I've never
23 looked into it, never studied it, never -- frankly
24 never thought about it.

25 To the second point, we do what we do, as I've

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1 described, because there is a marketplace of -- the
2 latest estimate I've seen is 45 million smokers,
3 adult smokers, in this country, and my job and the
4 job of the marketing department is, as I said, to
5 hold on to or increase our market share of that -- of
6 that populous, and that's -- that's the most
7 efficient way that I can think of to spend our
8 dollars, to speak to that population.

9 Q. But it's also Philip Morris policy not to do
10 anything in the marketing area to try to encourage
11 nonsmokers to take up smoking; right?

12 MR. HOWARD: Objection as to form.

13 A. It is not our desire or intent to speak to
14 adults who have chosen not to smoke or have not
15 chosen to smoke.

16 Q. Why not?

17 A. Because adults are well aware of the category,
18 the product; as I said, it's been around for hundreds
19 of years. They're free to choose for whatever
20 reasons whether to smoke or not to smoke, and my
21 interest and Philip Morris's interest is once they
22 have decided to smoke, I want them to decide to smoke
23 my brands.

24 And that's the most efficient and effective use
25 that I can think of of our marketing dollars, to

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1 speak directly to someone who has decided to smoke
2 and convince them to choose or, if they already have
3 chosen one of my brands, to stay with my brands.

4 Q. Well wouldn't it be in Philip Morris's economic
5 interests to encourage people -- adults who have not
6 yet chosen whether or not to smoke to choose to
7 smoke?

8 MR. HOWARD: Objection as to form.

9 A. I don't know whether it would be or not, and
10 I -- and I haven't thought about it. It's -- it's,
11 as I said, not something that -- that we think about,
12 not something that I do. I've got enough to worry
13 about in managing the brand portfolio that I have and
14 holding on to or increasing the market share that I
15 have.

16 Q. Why doesn't Philip Morris want to encourage
17 people who haven't yet made the decision whether or
18 not to smoke to make the choice to become a smoker?

19 MR. HOWARD: Objection as to form.

20 A. Well I can answer from my perspective, and I
21 think it's the company's perspective. We believe
22 that individuals should have the freedom to choose to
23 smoke and, if they choose to, should be free to
24 utilize and enjoy a legal product.

25 In the same vein and consistent with that, we

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1 would feel and I feel if you've chosen not to, that's
2 a -- a decision, an informed decision an individual
3 has made, and there's no value in my -- in -- in
4 our -- or I don't even know if there's an opportunity
5 to convince them otherwise. So we focus our efforts
6 on a portion of the adult population that's freely
7 chosen to smoke.

8 Q. Let me see if I can give you a hypothetical from
9 another area and see if that makes my question any
10 clearer because I -- I'm apparently not doing a very
11 good job here.

12 Kraft is a sister company to Philip Morris USA;
13 right?

14 A. Correct.

15 Q. And one of Kraft's major products is cheese;
16 right?

17 A. Yes.

18 Q. And cheese is a fairly mature market; right?

19 A. Yes.

20 Q. People have decided long ago whether they're
21 going to eat cheese or not eat cheese; right?

22 MR. HOWARD: Objection, --

23 A. I'm not familiar with --

24 MR. HOWARD: -- calls for speculation.

25 A. -- the dynamics of the cheese market or the

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1 cheese consumer, but --

2 Q. Well it's not a product you have to do a lot to
3 explain to people what cheese is and what it does
4 and, you know, what its benefits or advantages are.
5 People pretty much know what cheese is; right?

6 A. I -- I would suspect that people generally know
7 what cheese is.

8 Q. Okay. A few years back do you recall Kraft
9 doing a campaign where the tag line was essentially
10 "Things are better with cheese" and there would be a
11 picture of a juicy hamburger with a nice piece of
12 melted cheese kind of starting to drip off its sides
13 and it would be on billboards and very mouth
14 watering? Do you recall those?

15 A. As you describe it, I can recall the visual of a
16 hamburger with melting cheese. I don't recall the
17 details of the campaign and I -- I'm not sure if it's
18 Kraft, but I recall whatever --

19 Q. And -- and -- and -- and I don't -- you know, I
20 don't want to -- want to -- I'm not representing that
21 it necessarily was Kraft. That's my recollection,
22 but it may not have been.

23 But the purpose of that kind of advertising was
24 to get the adult who's -- or, for that matter,
25 presumably a teenager driving down the road, sees

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1 this billboard, to think, "Gosh, I could go for a
2 nice cheeseburger right now" and have them either
3 pull into a local restaurant or go to a grocery store
4 and -- and pick up some cheese and have a
5 cheeseburger that they might not otherwise have --
6 have decided to -- to choose to eat at that point;
7 right?

8 MR. HOWARD: Objection, calls for
9 speculation, but you can answer.

10 A. Yeah, I -- as I said, I don't recall the
11 particular campaign and I certainly can't speculate
12 on the intent. There could be a number of
13 explanations. If indeed it were, to your
14 recollection, a Kraft ad, it could very well be it
15 could have been a -- a brand ad or a brand campaign
16 to get Kraft cheese or one of the Kraft cheese brands
17 maintain top-of-mind awareness so when the shopper
18 goes to the grocery store or wherever they go to buy
19 cheese and reach into the -- the cold counter, they'd
20 pick Kraft cheese, in this example, as opposed to
21 another brand or a private label or generic brand or
22 just a block of cheese.

23 Q. You know, now that I think about it, maybe it
24 was a Dairy Association promotion or something for
25 cheese generically, but my -- my -- my point on using

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1 the cheese example is the -- the marketing strategy
2 behind that was to get customers to increase their
3 consumption of the product; right?

4 MR. HOWARD: Objection, calls for
5 speculation.

6 A. Again I'm not familiar with it. I'm not -- I
7 couldn't speculate. It -- it could be, as I said,
8 brand awareness. It could be, if it was the Cheese
9 Council, a publicity campaign for the goodness of
10 cheese. I don't know. I can't speculate.

11 Q. And you're certainly aware of marketing
12 strategies, whether this particular one is a good
13 example or not, but you're aware of marketing
14 strategies where even in a mature market with a
15 mature product, the goal is to increase consumer
16 consumption of the particular product; right?

17 A. I can't think of any off the top of my head that
18 are designed where -- where a company designs a
19 campaign to increase category consumption as opposed
20 to consumption of their brands. They may exist. I
21 can't -- I can't think of any.

22 Q. So you can't think of any -- well strike that.

23 In any event, it's -- it's your testimony that
24 Philip Morris does not do any marketing, advertising
25 or promotion to increase consumption of its product

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1 by those who are either already using it or who have
2 not yet chosen whether or not to -- to smoke?

3 MR. HOWARD: Objection to the term
4 "product" there. This is brands.

5 MR. GORDON: I mean cigarettes.

6 A. What we do is and what I do in my department is
7 market brands, and I -- I market those brands to
8 adults who have chosen to smoke.

9 Q. Why don't you market your brands to adults who
10 haven't yet chosen to smoke?

11 MR. HOWARD: Objection, asked and answered
12 several times.

13 A. As I said earlier, in a mature, well-known
14 category, public awareness of the product, a certain
15 portion of the adult population has chosen to utilize
16 the product, and my job and our objective is brand
17 building, to get them to utilize our brands over the
18 competitors'.

19 Q. Smokers are extremely brand loyal, aren't they?

20 A. There is good brand loyalty in the category
21 generally, more so on some brands than others.

22 Q. And historically the motivation to switch has
23 come from the health issue; right?

24 MR. HOWARD: Objection, lack of foundation
25 on historically, time frame.

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1 A. My understanding of various reasons a consumer
2 might switch is the availability of a new brand,
3 price reasons, a promotion that they may try that
4 gets them to try a different brand, dissatisfaction
5 for whatever reason with their current brand, desire
6 to -- to smoke a product with a different flavor or a
7 different tar delivery.

8 MR. GORDON: Let me have this marked.

9 (Plaintiffs' Exhibit 1308 was marked
10 for identification.)

11 BY MR. GORDON:

12 Q. Let me show you what's been marked as
13 Exhibit 1308, a document produced by Philip Morris
14 bearing Bates stamp number 200002189 [sic] through
15 2207, a document entitled on the second page "THE" --
16 "THE CIGARETTE CONSUMER, MARCH 20, 1984."

17 And certainly feel free to look at the whole
18 thing. I'm going to ask questions about pages 10 and
19 14 and 15.

20 MR. HOWARD: Can I ask, Mr. Gordon, do you
21 make a representation this came from Philip Morris's
22 files?

23 MR. GORDON: It's my understanding, yeah.
24 Do you know something that I don't?

25 MR. HOWARD: No. It's just there's no

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1 indication of source other than perhaps the Bates
2 stamp number, of which I'm not familiar, and I didn't
3 know what the "RPMPTCC" is on the bottom of the
4 page.

5 MR. NUNLEY: Mr. Gordon, I'd just say I'm
6 not -- I'm not familiar with a 25 series that's a
7 Philip Morris document. Do you think this is a
8 Philip Morris-produced document?

9 MR. GORDON: I thought it was, but I'm
10 certainly -- it's a ten-digit number, and I thought
11 Philip Morris was the only one using ten -- ten-digit
12 numbers.

13 MR. NUNLEY: Well I just -- I've never --
14 I've never seen one that starts with a 25.

15 MR. GORDON: You -- do you have -- you've
16 got my predesignations.

17 MR. NUNLEY: Yeah.

18 MR. GORDON: I'm curious if it's on there
19 because that would tell what database it's from too.

20 I note, by the way, that on page 12 it uses as a
21 source a PM annual switching survey, and I think it
22 unlikely that another manufacturer would be using
23 that. Also it's talking about Marlboro and Merit. I
24 don't know. Let's ask -- let's ask the witness.

25 BY MR. GORDON:

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1 Q. Do you -- do you --

2 Do you recognize this?

3 A. I don't recall ever seeing the -- the document,

4 no.

5 MR. GORDON: It also says on page 16 "P.M.

6 BEST SITUATED DEMOGRAPHICALLY."

7 MR. NUNLEY: Mr. Gordon, I'll tell you,

8 just to point it out, it does appear on your

9 predesignation. It's the only document, though, that

10 has a 25 start number. I can't tell you that it's

11 not a Philip Morris-produced document. I just do not

12 recognize that as being --

13 MR. GORDON: What -- does it say what

14 database it's from or --

15 MR. NUNLEY: No. It's --

16 MR. GORDON: Oh. Yeah, it -- that would --

17 MR. NUNLEY: That means a Philip Morris

18 database.

19 MR. GORDON: That -- that's taken off the

20 4B, so that that -- this is a Philip Morris-produced

21 document.

22 MR. HOWARD: And I acknowledge what you

23 said about the indication, what page 12 says, and

24 those are PM brands and it does say "P.M. ANNUAL

25 SWITCHING SURVEY" in the content of the document. I

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1 was just wondering because I don't know what
2 "RPMPTCC" is. There's no cover page. I didn't know
3 whether you were representing it to be a Philip
4 Morris document or not.

5 MR. GORDON: It's my understanding that it
6 is, and --

7 MR. HOWARD: Okay.

8 MR. GORDON: -- you know, let's -- let's
9 see if what it says in here is consistent or
10 inconsistent with -- with Mr. Mikulay's
11 understanding.

12 BY MR. GORDON:

13 Q. Start with page ten. At the topic "BRAND
14 LOYALTY" it says "SMOKERS EXTREMELY" BLAND -- strike
15 that, "SMOKERS EXTREMELY BRAND LOYAL." Do you see
16 that?

17 A. Yes, sir.

18 Q. Do you agree with that?

19 A. Well as I said, I'm not familiar with the
20 document, so I'm not -- I can't speculate on where it
21 came from or if this was research or an opinion. As
22 I stated earlier, brand loyalty in -- in this
23 category is higher than -- than a lot of other
24 consumer packaged goods categories, is my
25 understanding.

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1 Q. And do you see where it says about the second
2 paragraph up from the bottom "HISTORICALLY,
3 MOTIVATION HAS COME FROM HEALTH ISSUE, PEOPLE WILLING
4 TO STICK WITH LOWER TAR BECAUSE THEY FEEL ARE DOING
5 THEMSELVES A FAVOR"?

6 A. Yes, I see that.

7 Q. Is that consistent with your understanding?

8 MR. HOWARD: Objection, no foundation,
9 ambiguous as to motivation of what.

10 Q. Motivation for switching; right? That's what
11 that paragraph is referring to.

12 MR. HOWARD: Objection, no foundation.

13 A. It doesn't specifically speak to -- to
14 switching. I can't tell specifically from that
15 statement what -- what the document's referring to.

16 Q. So where it says just above it "SWITCHING
17 REQUIRES EXTENDED USE AND MOTIVATION, EXTENDED USE TO
18 GET ACCUSTOMED, MOTIVATION FOR EXTENDED USE;
19 HISTORICALLY, MOTIVATION HAS COME FROM HEALTH ISSUE,"
20 you don't think that refers to switching?

21 MR. HOWARD: Objection as to form.

22 A. It may.

23 Q. And my question is: The motivation to switch,
24 is it your understanding that historically that has
25 come from the health issue?

1 MR. HOWARD: Objection as to form.

2 A. As I stated earlier, one of the motivations to
3 switch, my understanding has been switching to
4 different tar-delivery products. Another motivation
5 would be price of the product, premiums and programs
6 that are offered by -- by certain brands that may
7 induce trial and switching.

8 Q. Which Philip Morris brands have the tar and
9 nicotine content printed on the package?

10 A. I believe -- I believe Merit is the only brand
11 that does.

12 Q. Why?

13 A. I'm not familiar with the exact reason that
14 would have been done when the brand was launched. I
15 would -- I would speculate that at a point in time
16 where there was increasing consumer demand for
17 lower-tar-delivery products and Philip Morris decided
18 as one of their entries into that growing consumer
19 segment was Merit, that a comparison of tar/nicotine
20 deliveries of the Merit product relative to
21 competitive products already on the market might be
22 meaningful communication to the consumer who's
23 looking to compare one brand to another.

24 Q. Isn't it a fact, Mr. Mikulay, that the reason
25 Philip Morris puts the tar/nicotine content on Merit

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1 and only Merit is because it wants to market those to
2 consumers who are concerned about the health issue
3 and want to switch to a lower-tar product because
4 they perceive that smoking a lower-tar product will
5 be of some health benefit to them?

6 MR. HOWARD: Objection, no foundation and
7 compound and assumes facts not in evidence.

8 A. As I said, there are other competitive brands,
9 it is my understanding, that had tar and nicotine
10 delivery on their product prior to Merit's
11 introduction. There are consumers who were smoking
12 those products who may have been more interested than
13 others in actually comparing those numbers. This is
14 an opportunity to -- to fill that consumer demand for
15 greater information than -- than they could already
16 receive in terms of trying nicotine disclosure on
17 advertising.

18 Q. Why would Merit smokers be more interested in
19 tar -- comparing tar and nicotine numbers than
20 Marlboro, Virginia Slims or Benson & Hedges smokers?

21 MR. HOWARD: Objection, calls for
22 speculation.

23 A. I have no reason to believe they are or they
24 aren't.

25 Q. Well why doesn't Philip Morris provide that

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1 information for brands other than -- other than
2 Merit?

3 A. We do provide that information for all of our
4 brands. Tar and nicotine disclosures are part of all
5 of our advertising.

6 Q. I'm talking about on the package itself. I'm
7 sorry.

8 A. Again as I said earlier, I can only speculate
9 that when the decision was made, there were brands
10 of -- of positions similar from a marketing
11 standpoint of similar tar and nicotine delivery, and
12 for competitive reasons and clarity of communication
13 to the consumer it was decided to put those design --
14 designations on the pack --

15 Q. Wouldn't it --

16 A. -- I believe in the mid-'70s.

17 Q. Wouldn't it be --

18 Wouldn't it provide clarity to the consumer to
19 have that on all Philip Morris packages?

20 A. I don't know that it would provide any more
21 clarity than already exists in -- in the inclusion of
22 that information on our ads.

23 Q. Let me direct your attention to page 14 of
24 Exhibit 1308. Do you see the paragraph that says
25 "PEOPLE BEGIN SMOKING, 1., PEER PRESSURE, 2., TO

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1 REBEL/ASSERT INDEPENDENCE, 3., TO APPEAR GROWN UP,
2 4., TO EXPERIMENT"? Do you see that?

3 A. Yes, I do.

4 Q. Is that consistent with your understanding of
5 why people begin smoking?

6 MR. HOWARD: Objection, lack of foundation,
7 calls for speculation.

8 A. As I stated earlier, my general sense as to the
9 influences on -- on people to -- to smoke is peer
10 pressure, whether or not friends, colleagues smoke,
11 parental influence, whether or not their parents
12 smoke.

13 Q. And then do you see continuing on on page 14
14 "SOME RESIDUAL REMAINS OF THESE MOTIVATIONS AS
15 SMOKERS AGE BUT, FOR THE MOST PART, PEOPLE CONTINUE
16 TO SMOKE BECAUSE THEY FIND IT TOO UNCOMFORTABLE TO
17 QUIT"? Do you see that?

18 A. Yes, I do.

19 Q. And in discharging your duties as head of
20 marketing for Philip Morris, is that consistent with
21 your understanding of why people continue to smoke?

22 A. I can't say that I have any knowledge as to why
23 an individual might continue to smoke or why an
24 individual might quit. I'm aware that there's a
25 large number of former smokers who have quit. As I

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1 indicated earlier, the industry has been declining in
2 this country for 15 years, so apparently people
3 continue to quit. Some people do not. Upwards of 45
4 million have not so far, and my focus, as I've stated
5 earlier, is -- is marketing my brands to those who
6 choose to smoke.

7 Q. And you don't do anything to study to find out
8 why they continue to smoke?

9 A. I'm not aware that -- that the company's ever
10 looked at why people continue to -- to smoke.

11 Q. Okay. Direct your attention to the next line on
12 page 14 where it says, quote, "OVER 85 PERCENT OF
13 SMOKERS AGREE STRONGLY/VERY STRONGLY TO," quote, "'I
14 WISH I HAD NEVER BEGAN SMOKING,'" close quote. Do
15 you see that?

16 A. Yes, I do.

17 Q. Is that the first time you've heard that
18 statistic quoted?

19 A. I don't ever -- I don't recall ever hearing that
20 statistic.

21 Q. Okay. Do you ever recall seeing any study that
22 examined how many existing smokers expressed the wish
23 that they had never begun smoking?

24 A. I -- no, I don't recall ever seeing any study
25 that was done for that purpose.

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1 Q. Let me show you what's been previously marked as
2 Exhibit 357, a document produced by Philip Morris
3 bearing Bates stamp number 2041787758 through 7815, a
4 document entitled "SMOKER DYNAMICS."

5 (Witness reviews Plaintiffs' Exhibit 357.)

6 A. Sorry.

7 Q. Have you ever seen this document before?

8 A. I don't recall seeing this document. I saw a
9 lot of documents in preparation for -- for this
10 testimony. I may have seen it.

11 Q. Okay.

12 A. It doesn't ring a bell.

13 Q. Take a look at the first page of text on this
14 document where under "SMOKER DYNAMICS" it says "IN
15 TODAY'S MARKETPLACE A BRAND'S SHARE OF SMOKERS WILL
16 GROW IF: IT ATTRACTS NEW SMOKERS OR IT ATTRACTS
17 SWITCHERS OR IT ATTRACTS RETURNING SMOKERS." Do you
18 see that?

19 A. Yes.

20 Q. You agree with all those statements; right?

21 A. Ways to grow brand share would be, as I've said
22 earlier, smokers of -- of competitive brands
23 switching into -- to one of your brands, attracting
24 someone who has decided to smoke but hasn't made a
25 brand choice, getting them to -- to choose your

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1 brands.

2 Q. That's a new smoker?

3 A. That's -- that's a definition I'm using.

4 Q. Yeah, okay.

5 A. Yeah.

6 Q. Now if you would turn to page marked -- I think

7 it's 33, Bates number 7791. It says under -- it says

8 "NEW SMOKERS"; right?

9 A. Yes.

10 Q. And the first line says "ABOUT THREE-QUARTERS OF

11 STARTING SMOKERS ARE 21 YEARS OF AGE AND YOUNGER";

12 right?

13 A. Yes.

14 Q. Is that consistent with your understanding?

15 MR. HOWARD: Objection, lack of

16 foundation.

17 A. As I said, I'm not familiar with the document

18 and I don't know the source of the information. I'm

19 generally aware that a percentage of -- of smokers

20 begin before they're 21.

21 Q. Okay. And the next line says "BUT, WE DON'T

22 INTERVIEW ANYONE UNDER 18"; right?

23 A. Yes, it does.

24 Q. And the next line says "AS A RESULT, THE

25 18-TO-21 SEGMENT PROVIDES OUR BEST INSIGHTS INTO NEW

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1 SMOKERS"; right?

2 A. Yes.

3 Q. What other insights could there be?

4 MR. HOWARD: Objection, ambiguous, vague.

5 A. I'm not sure I understand the question.

6 Q. Well three-quarters of smokers are 21 years of
7 age or younger. Isn't the 18-to-21 segment 75
8 percent of all new smokers?

9 MR. HOWARD: Objection, lack of
10 foundation.

11 A. As I said, I don't -- I don't know the
12 statistics or the source of this information. A
13 portion -- a proportion of smokers do choose to smoke
14 before the age of 21.

15 Q. And a portion choose to smoke before age 18;
16 right?

17 MR. HOWARD: Objection, lack of foundation,
18 but you can answer.

19 A. I don't know that this -- this document infers
20 that. My general understanding is some people do
21 start smoking before age 18.

22 Q. The next page under "NEW SMOKERS," it says
23 "PHILIP MORRIS IS VERY STRONG." Do you see that?

24 A. Yes.

25 Q. Do you know why?

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1 MR. HOWARD: Objection as to form.

2 A. Do I know --

3 Q. Why Philip Morris is very strong with new
4 smokers.

5 A. I can't speculate as to what the intent was
6 here. It's not very clear.

7 MR. GORDON: Can I have this exhibit
8 marked.

9 (Plaintiffs' Exhibit 1309 was marked
10 for identification.)

11 BY MR. GORDON:

12 Q. Let me show you what's been marked as
13 Plaintiffs' Exhibit 1309, a document produced by
14 Philip Morris bearing Bates stamp number 2023741642
15 through 1678, a document entitled "SMOKER DYNAMICS,"
16 and you can certainly look at it and compare it to
17 357, but I'll -- I'll represent to you that it's --
18 it's largely the same as 357, but there are a
19 couple --

20 A. It looks very familiar, I mean, very similar
21 to --

22 Q. Yeah. There are a couple of pages in 1309 that
23 don't appear in Exhibit 357, and it's those pages I
24 want to talk to you about. And they're found at --
25 at the back on, if you'll look at the Bates numbers,

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1 1676 and 1677.

2 A. Is that this black number?

3 MR. HOWARD: Yes, the Bates number.

4 A. 1676?

5 Q. Right. The title is "SUMMARY, PM SHARE OF
6 SMOKERS."

7 A. Yes.

8 Q. Okay. And I direct your attention to the -- the
9 bottom line that says "NEW SMOKERS, 67.5." Do you
10 see that?

11 A. Yes.

12 Q. Is that consistent with your understanding
13 that -- in other words, that Philip Morris was
14 getting 67.5 percent of the new smokers?

15 MR. HOWARD: Objection, lack of foundation,
16 but you may answer.

17 A. I'm not -- as I said, I'm not familiar with the
18 document so I don't know the source of the
19 information or the intent of the author. I -- I
20 can't quote a statistic. Certainly Philip Morris
21 does get some portion of people who decide to smoke
22 and in the process of making their brand choice
23 choose ours.

24 Q. Is it as much as two out of three?

25 MR. HOWARD: Objection, lack of

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1 foundation. You can answer.

2 A. I -- I can't recall ever having seen data that
3 speaks to that.

4 Q. You don't know?

5 A. I'm not aware.

6 Q. Philip Morris doesn't do anything to find out
7 how many -- what percentage of new smokers it's --
8 it's attracting?

9 A. No, I would imagine there is -- there could have
10 been data available that could have -- there could be
11 studies. There could be information on our consumer
12 tracking database that asks those questions. I
13 just -- I just can't recall if -- if that data is
14 there or, if it is, what it would be.

15 Q. As the vice president of marketing -- marketing,
16 are you interested at all in what percentage of new
17 smokers Philip Morris is getting?

18 A. What I'm most interested in is -- is the brand
19 share of smokers of my various brands. To the extent
20 that we would have information like that, certainly
21 there would be people in the organization that would
22 look at it. It's not something I look at. As I
23 said, I'm not aware that -- that it exists or, if it
24 does, what -- what our share would be.

25 Q. Philip Morris carefully studies the percentage

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1 of people switching out of Philip Morris brands and
2 switching into Philip Morris brands, doesn't it?

3 A. PM from time to time has -- will track inflow
4 and outflow and alternate purchases and -- and
5 switching patterns.

6 Q. And as --

7 As vice president for marketing, aren't you
8 interested in -- in knowing what those switching
9 patterns are?

10 A. In -- in my job, my responsibility, I am -- I'm
11 interested in -- in -- in the general trends as it
12 relates to, yeah, our brands.

13 Q. So your --

14 A. Is --

15 Q. I'm sorry.

16 A. Whether or not inflow or outflow or alternate
17 purchase or switching is on a -- on a trended basis
18 increasing or decreasing.

19 Q. So you're not just interested in the absolute
20 number of -- of sales and -- and what share of market
21 that those sales represent. You're interested in
22 the -- the number of switchers into and out of Philip
23 Morris products that those numbers represent; right?

24 A. I -- when I see information like that, I tend to
25 see it in -- in a very summary form in a -- as I

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1 indicated earlier, in a trend basis as opposed to an
2 absolute basis. What's of interest is if I have an
3 objective of maintaining or increasing brand loyalty
4 amongst the smokers of Merit, for example, the -- a
5 piece of information or some pieces of information
6 that I would look at -- look at on a trended basis is
7 are switching patterns shifting at all or staying the
8 same over time, are alternate purchase patterns of
9 our Merit smokers changing over time.

10 So I tend not to look at absolute numbers but,
11 as I said, trends over time to look for patterns and
12 behavior.

13 Q. Right. And switching -- switching patterns are
14 one measure of the effectiveness of your marketing
15 programs; right?

16 A. It is one measure. That would be, yes.

17 Q. And percentage of new smokers is another measure
18 of effectiveness of your marketing program, isn't
19 it?

20 A. I suppose that -- that the pool of people at any
21 point in time who have decided to smoke and haven't
22 chosen a brand and choose my brand could be a measure
23 of that.

24 Q. But you don't routinely study that?

25 A. I don't routinely study those details because,

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1 as I indicated earlier, I see information in the
2 aggregate and trends in terms of the behavior of
3 smokers within the brand.

4 Q. And as you sit here today, you have no idea what
5 percentage of new smokers Philip Morris is getting?

6 A. No, I can't say that I -- that I'm aware of that
7 statistic. I -- I would tend to look at information
8 on a brand's share, for example, of various age demos
9 or age cohorts, is that increasing or decreasing. As
10 I said earlier, the data may exist. The data may
11 indeed exist in consumer tracking. It's not a piece
12 of data that -- that I recall being aware of or that
13 I look at.

14 Q. Okay. If you turn to the next page, please, do
15 you see the line in about the middle of the page
16 where it says "WE'RE DOING A GREAT JOB OF ATTRACTING
17 NEW SMOKERS AND RETURNING SMOKERS"? Do you see
18 that?

19 A. Yes.

20 Q. Do you agree that Philip Morris is doing a great
21 job of attracting new smokers?

22 MR. HOWARD: Objection as to form. You can
23 answer.

24 A. As I said, I don't -- I'm not familiar with the
25 document. I don't know what this statement is based

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1 on, if it's based on speculation or data. I have no
2 way of -- I have no way of assessing that.

3 Q. Well how would you characterize the job that
4 Philip Morris is doing of attracting new smokers?

5 MR. HOWARD: Objection, time frame.

6 A. The primary way that I assess the effectiveness
7 of our -- of our marketing and advertising programs
8 is am I -- are we increasing our share of market, is
9 a brand increasing its share of market, and as I --
10 as I stated earlier, that's -- that's the primary
11 measure that I look at, that I'm interested in. That
12 is influenced by a number of different possible
13 factors, increased share of purchase requirements
14 amongst loyal smokers, less alternate purchase,
15 switching into the brand or less switching out of the
16 brand, people coming into the marketplace and looking
17 to make a brand choice and -- and making this a brand
18 choice. But the overall measure that I'm focused on
19 is am I increasing my share of that brand in the
20 marketplace.

21 Q. Who's your superior?

22 A. Mike Scymancyk.

23 Q. That's the new CEO?

24 A. That's correct.

25 Q. Up until a few days ago, it was Jim Morgan?

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1 A. No. Actually in Mike's previous role as chief
2 operating officer I also reported to him.

3 Q. Okay. Did he or Jim Morgan ever ask you how
4 Philip Morris was doing with attracting new smokers?

5 A. I -- I don't recall that either of them have
6 asked me that. They asked me lots of questions as to
7 how -- how the brands are performing in terms of
8 market share, in terms of their share of different
9 retail trade classes, in terms of their share
10 geographically, in terms of their share of various
11 age and demographic cohorts. That --

12 Q. So --

13 So if Mike Scymancyk were to call you up
14 tomorrow morning and say, "Tell me, how -- what kind
15 of a job is Philip Morris doing with attracting new
16 smokers? I want to report to the board of
17 directors," you'd have to say, "Don't know"?

18 MR. HOWARD: Objection as to form.

19 A. As I said, I can't recall him ever asking that.
20 I can't envision why he would -- would ask a question
21 like that. If he did, in your hypothetical example,
22 my first approach would be to find out if -- if that
23 information exists and where it exists.

24 Q. Why is it that you can't imagine why the chief
25 executive officer of a consumer product company would

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1 be interested in knowing how good a job its marketing
2 department was doing in attracting new consumers?

3 A. Well because what he would be focused on is
4 looking to me to increase our share of market
5 overall, which can include increasing our share of
6 market for a particular brand or holding on to a
7 share of market of another brand and overall are we
8 increasing market share, what -- he would be
9 interested in the -- the results at the end of the
10 day.

11 Q. And you just can't imagine that he'd have any
12 curiosity as to how successful the marketing
13 department was in attracting new consumers to the
14 Philip Morris product line?

15 MR. HOWARD: Objection as to form and the
16 use of the word "new consumers" as opposed to "new
17 smokers."

18 A. He certainly might be interested in the same
19 kind of measures that I had indicated earlier in
20 terms of how we're doing overall or how a particular
21 brand or the brands in general are doing relative to
22 various measures and as a result an increase in
23 market share.

24 THE REPORTER: Off the record, please, to
25 change tape.

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1 (Recess taken.)

2 BY MR. GORDON:

3 Q. Mr. Mikulay, just I'm trying to understand your
4 testimony with respect to Philip Morris's marketing
5 efforts and how it relates to attracting new
6 smokers. Is it your testimony that Philip Morris
7 simply doesn't care about attracting new smokers?

8 A. What I was trying to describe is that what we're
9 concerned about and what I look at is our -- the
10 share of our brands in the marketplace and whether or
11 not they're going in the right direction, hopefully
12 increasing or in some brands that may not be
13 positioned as well in the marketplace as other brands
14 holding that market share, and there are lots of
15 components of that, consumers of those brands not
16 switching out, not -- minimizing their purchase of
17 alternative products, competitive smokers switching
18 in, smokers who have recently decided to smoke and
19 are making brand choices, to your description, new
20 smokers.

21 So to the extent that all of those factors
22 contribute to positive share growth, that's what I'm
23 interested in. And -- and I'm interested in -- in
24 all of those factors.

25 What I was trying -- what I was trying to

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1 indicate is I don't look at that data on a day-to-day
2 basis. I look at trends and overall performance, but
3 for adults who have chosen to smoke, I'm interested
4 in as many of them as possible choosing my brands or
5 staying with my brands, be they someone who's just
6 making a brand choice or has made a brand choice and
7 decided to stay with us.

8 Q. Philip Morris can lose existing customers if
9 they switch to a competitive brand; right?

10 A. That's correct.

11 Q. That's called switching out; right?

12 A. That's correct.

13 Q. And Philip Morris can lose an existing customer
14 if that customer quits smoking; right?

15 A. Correct.

16 Q. That's referred to as a quitter; right?

17 A. Correct.

18 Q. And Philip Morris also loses a customer if the
19 customer dies; right?

20 A. Correct.

21 Q. Okay. And all three things happen on a daily
22 basis; right? People switch out and people quit and
23 people die; right?

24 A. On an ongoing basis, all those things happen.

25 Q. And the only way you can replenish those

1 customers that you lose is by, number one, people
2 switching in; number two, quitters restarting; and
3 number three, new starters. Right?

4 MR. HOWARD: Objection to the term
5 "replenish," but you can answer.

6 Q. New smokers.

7 A. Yes.

8 Q. And marketing --

9 A. Those are -- those are ways -- yes, those are
10 ways that I can increase my market share. I can also
11 increase my market share by increasing the share of
12 purchase requirements of a particular -- of a
13 brand-loyal consumer less alternate purchasing of
14 competitive brands.

15 Q. Also if they increase their absolute consumption
16 of cigarettes; right?

17 A. Theoretically, yes.

18 Q. If a pack-a-day smoker becomes a two-pack-a-day
19 smoker and he's a Philip Morris smoker, he's going to
20 increase consumption of Philip Morris products;
21 right?

22 A. Theoretically, yes.

23 Q. Okay. And in terms of marketing, one of the
24 marketing goals is to minimize switching out; right?

25 A. The overarching goal is to communicate to the

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1 loyal adult smokers of my brands. That's the largest
2 segment of any brand share. That's the -- that's the
3 smoker base that I'm most interested in retaining
4 because those are, to your point earlier, the more
5 loyal of my smokers. In addition to that, convincing
6 smokers of competitive brands to try and switch to
7 one of my brands is also a way of increasing market
8 share, yes.

9 Q. Okay. But one of the subgoals of that
10 overarching goal is to minimize switching out;
11 right?

12 A. That's correct.

13 Q. And another subgoal is to maximize switching
14 in?

15 A. That's correct.

16 Q. And another goal is to maximize the number of
17 new smokers who choose Philip Morris as their first
18 initial brand; right?

19 A. That's correct.

20 Q. Okay. Can't do anything about people dying.
21 That's not an area of marketing that you can deal
22 with; right?

23 A. That's correct.

24 Q. Okay. What about quitters? Does marketing have
25 any goals with respect to people who are thinking

1 about quitting?

2 MR. HOWARD: Objection as to form.

3 A. I'm not aware that there's anything in our -- in
4 our marketing plans that would address -- that would
5 address quitters with the possible exception of from
6 time to time potential product modifications that
7 might be addressing a particular consumer need, that.

8 Q. So for example, a -- a lower-tar version of a --
9 of a product so that somebody thinking of quitting
10 might simply switch to a lower-tar version instead?
11 Is that what you mean?

12 A. Actually what I was thinking about was a smoker
13 in a single -- single-smoker household whose spouse
14 finds cigarette smoke irritating or maybe has an
15 allergy to it or whatever, and if there was a
16 possibility, if we knew that, if we knew that was an
17 issue for a segment of the smoking population and
18 were able to design and market a brand that had less
19 sidestream smoke from the lit end, that might be a
20 benefit that that consumer would be interested in.

21 Q. Well, how about my example? Is -- isn't one of
22 the purposes of having low-tar offerings to provide
23 an alternative for people who are thinking about
24 quitting so that they stay with the smoking Philip
25 Morris brand rather than quitting?

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1 A. The purpose of -- of PM participating in -- in
2 all relevant segments of the marketplace is if there
3 is a consumer demand there, we'll participate in that
4 segment with the best product we could possibly
5 manufacture and market it as such. And there --
6 there has been over the last 20 years, as an example,
7 an increasing demand on consumers for lower-tar
8 products, and whereas Philip Morris wasn't, to my
9 recollection, the first marketer into that, into
10 those segments, once -- once consumer demand was
11 recognized, we were very aggressive at participating
12 in -- in most, if not all, viable categories.

13 Q. You would agree that Philip Morris has an
14 affirmative duty to actively discourage youth from
15 smoking; right?

16 MR. HOWARD: Objection to the term "duty."
17 You may answer if you're able.

18 A. Philip Morris believes that minors should not
19 smoke, and we've taken steps in programs like Action
20 Against Access to discourage youth smoking and access
21 to products, working with state legislatures like the
22 state of Minnesota to help them address that issue,
23 enforce existing laws.

24 Q. Have you ever had occasion to compare your
25 marketing and promotion budget versus the amount of

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1 money you actually spend on trying to prevent youth
2 smoking?

3 A. No, I've never looked at that.

4 Q. I'd like to show you what's been previously
5 marked as Exhibit 602, and I'll represent to you this
6 is an expert report prepared by one of plaintiffs'
7 experts, and I'm going to -- I'm going to -- it's a
8 lengthy report. I'm going to -- there's only one
9 page I want to show you on it, and I'm going to open
10 it to the page. You're certainly free to look at the
11 entire report if you want.

12 The page I'm showing you is entitled "Philip
13 Morris, Youth Prevention Expenditures to Advertising,
14 Marketing & Promotion (1969-1994)." And this -- this
15 pie chart reflects advertising, marketing and
16 promotion expenditures of a little over 18 billion
17 versus youth prevention expenditures of about 20
18 million.

19 My question is: Do you have any independent
20 reason to dispute the figures or the relative amounts
21 of expenditures?

22 MR. HOWARD: Objection, lack of foundation,
23 unfair question.

24 A. As you've already pointed out, I wouldn't be
25 familiar with the document. I have -- I would have

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1 no way to confirm or refute the information.

2 Q. Well you're familiar with expenditures, aren't
3 you, for marketing?

4 A. Yes, I am.

5 Q. Does 18 billion over the last 25 years or the 25
6 years from '69 to '94 sound about right?

7 MR. HOWARD: Objection, lack of
8 foundation. I think, --

9 A. I'm not --

10 MR. HOWARD -- Mr. Gordon, to be fair, you
11 should give him a chance to take a look through the
12 entire document, --

13 MR. GORDON: Sure.

14 MR. HOWARD: -- just not referring to one
15 page, if there's some indication in the document as
16 to how that number was arrived at.

17 MR. GORDON: Sure.

18 MR. HOWARD: To save time, do you want to
19 point to the -- point out to the witness where in
20 this report the components of that figure on the pie
21 chart --

22 MR. GORDON: I think they appear on the --

23 MR. HOWARD: -- were arrived at?

24 MR. GORDON: -- very first page of text
25 right after the table of contents.

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1 And the source I believe -- I'm trying to find
2 where it's set forth, but it's discovery responses
3 and annual reports. Maybe it's at the back.

4 MR. HOWARD: I -- I see the figure, but
5 it's just in conclusory fashion on that page. I'm
6 asking whether in this report it lists what the
7 components are that comprise --

8 MR. GORDON: Oh, I see.

9 MR. HOWARD: -- the \$18 billion figure.

10 MR. GORDON: Yeah, it's -- if you flip to
11 the back page, I don't know how readable it is. It's
12 pretty tiny type.

13 A. The very last page?

14 Q. Yeah.

15 MR. HOWARD: Can you read that?

16 Q. Are you able to read that? It's about the size
17 of your "underage sale prohibited" that you put on
18 the side of cigarettes.

19 MR. HOWARD: Objection, Counsel. It's
20 about a 20th of that size.

21 Q. It's a pretty poor photocopy.

22 A. Yeah, I can't tell. One of the costs of aging
23 is inability to see mouse type.

24 Q. So you don't have any independent knowledge
25 whether 18 billion is a reasonable figure for the 25

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1 years of advertising, marketing and promotion or
2 not?

3 A. I don't have any basis to -- to confirm or deny,
4 no.

5 Q. What's the advertising, marketing and promotion
6 budget for this year?

7 A. For 1997 the total marketing budget is
8 approximately 1.5 billion.

9 Q. How much is the youth prevention budget?

10 MR. HOWARD: Objection as to form.

11 A. I'm not aware.

12 MR. HOWARD: I'm not aware of what
13 protective orders are in place, but obviously the
14 question's going to 1997 marketing budgets,
15 confidential information, and I take it that we're
16 having the opportunity to review and designate as
17 confidential portions of this --

18 MR. GORDON: You do.

19 MR. HOWARD: -- deposition.

20 MR. GORDON: Yes, you do. You have 30
21 days.

22 MR. HOWARD: Thank you. Thank you,
23 Mr. Gordon.

24 MR. GORDON: Thanks. I have nothing
25 further.

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1 THE REPORTER: Off the record, please.

2 (Deposition recessed at 6:51 o'clock

3 p.m.)

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1 C E R T I F I C A T E

2 I, William C. LaBorde, hereby certify that
3 I am qualified as a verbatim shorthand reporter; that
4 I took in stenographic shorthand the testimony of
5 CLARE PURCELL, KENNETH S. HOUGHTON, ELLEN MERLO AND
6 ROBERT L. MIKULAY at the time and place aforesaid;
7 and that the foregoing transcript consisting of pages
8 1 through 287, Volume I, is a true and correct, full
9 and complete transcription of said shorthand notes,
10 to the best of my ability.

11 Dated at New York, New York, this 23rd day
12 of September 1997.

13

14

15

16 WILLIAM C. LaBORDE

17 Registered Professional Reporter

18 Notary Public

19

20

21

22

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1 C E R T I F I C A T E

2 I, CLARE PURCELL, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 1 through 85, Volume I, and that
5 said transcript is a true and correct, full and
6 complete transcription of my deposition, except per
7 the attached corrections, if any.

8

9 (Please check one.)

10

11 ____ Yes, changes were made per the attached
12 (no.) ____ pages.

13

14 ____ No changes were made.

15

16

17 CLARE PURCELL

18 Deponent

19

20 Sworn and subscribed to before me this day
21 of 199__.

22

23

24 Notary Public

25 My commission expires: (WCL)

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1 C E R T I F I C A T E

2 I, KENNETH S. HOUGHTON, the deponent,
3 hereby certify that I have read the foregoing
4 transcript consisting of pages 86 through 140,
5 Volume I, and that said transcript is a true and
6 correct, full and complete transcription of my
7 deposition, except per the attached corrections, if
8 any.

9
10 (Please check one.)

11
12 ____ Yes, changes were made per the attached
13 (no.) ____ pages.

14
15 ____ No changes were made.

16
17
18 KENNETH S. HOUGHTON
19 Deponent

20
21 Sworn and subscribed to before me this day
22 of 199__.

23
24 Notary Public

25 My commission expires: (WCL)

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1 C E R T I F I C A T E

2 I, ELLEN MERLO, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 143 through 231, Volume I, and
5 that said transcript is a true and correct, full and
6 complete transcription of my deposition, except per
7 the attached corrections, if any.

8

9 (Please check one.)

10

11 ____ Yes, changes were made per the attached
12 (no.) ____ pages.

13

14 ____ No changes were made.

15

16

17 ELLEN MERLO

18 Deponent

19

20 Sworn and subscribed to before me this day
21 of 199__.

22

23

24 Notary Public

25 My commission expires: (WCL)

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1 C E R T I F I C A T E

2 I, ROBERT L. MIKULAY, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 237 through 287, Volume I, and
5 that said transcript is a true and correct, full and
6 complete transcription of my deposition, except per
7 the attached corrections, if any.

8

9 (Please check one.)

10

11 ____ Yes, changes were made per the attached
12 (no.) ____ pages.

13

14 ____ No changes were made.

15

16

17 ROBERT L. MIKULAY

18 Deponent

19

20 Sworn and subscribed to before me this day
21 of 199__.

22

23

24 Notary Public

25 My commission expires: (WCL)

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